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New York (State) Courts

THE MISCELLANEOUS REPORTS.

CASES DECIDED

IN THE

COURTS OF RECORD

OF THE

STATE OF NEW YORK

OTHER THAN THE

Court of Appeals and the Appellate Division of the Supreme Court,

INCLUDING THE APPELLATE TERM OF THE SUPREME COURT FOR THE HEARING OF APPEALS FROM THE CITY COURT OF THE CITY OF NEW YORK AND THE MUNICIPAL COURT OF THE CITY OF NEW YORK; SPECIAL TERMS AND TRIAL TERMS OF THE SUPREME COURT, CITY COURT OF THE CITY OF NEW YORK, THE COURT OF GENERAL SESSIONS OF THE PEACE IN AND FOR THE CITY AND COUNTY OF NEW YORK, COUNTY COURTS, AND OF THE SURROGATES' COURTS, IN PURSUANCE OF LAWS OF 1892, CHAPTER 593.

ROBERT G. SCHERER, REPORTER.

VOLUME XXXV.

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**Designated pursuant to sec. 12, Art. VI, of the Constitution.

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†Appointed September 1, 1900 vice Frederick Smyth, deceased.

§§Appointed December 22, 1900, vice Henry R Beekman, deceased.

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THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK.

COMMENCING MAY, 1901.

THE JOHN P. KANE CO., Plaintiff, *v.* FRANCIS S. KINNEY et al., Defendants.

(Supreme Court, New York Special Term, May, 1901.)

Mechanics' liens — Subcontractors' lien not cut off by contractor's general assignment — Construction of L. 1897, ch. 418, § 15.

Mechanics' liens, filed within ninety days after the completion of the work, by subcontractors because of the contractor's failure to pay them, are not cut off by his assignment for benefit of creditors delivered before the liens were filed, and the general assignee must, where, at the time of the assignment, the owner owed the contractor moneys sufficient to satisfy the liens, satisfy them before any of the assigned estate can be applied to the debts of the contractor's general creditors.

Semble, that where the liens are filed in time, they cannot be cut off by a general assignment of the contractor delivered and recorded before the liens were filed.

The provisions of the Lien Law (L. 1897, ch. 418, § 15) declaring that no assignment of a contract, for labor or materials to improve real property, or of money due or to become due therefor, shall be valid until the contract and assignment, or a statement or a copy thereof, are filed in the office of the county clerk of the county where the property is situated, have no application to a general assignment of the contractor and relate only to the case of a special assignment made by him for value.

ACTION to foreclose mechanics' liens.

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J. Woolsey Shepard, for plaintiff.

Lord, Day & Lord, for defendant Charles N. Talbot, as assignee, etc.

William D. Peck, for defendant Clarence L. Smith.

George V. Brower, for defendant Childs.

LEVENTRITT, J. This is an action to foreclose mechanics' liens and involves the determination of priority between lienors and a general assignee of the contractor for the benefit of creditors.

The material facts are as follows:

The defendant Robinson, a contractor, entered into an agreement for the construction of a building with the defendant Kinney, the owner of the property against which the liens were filed. The plaintiff and the defendants Smith and Childs were materialmen under contract with the defendant Robinson. On the 7th day of March, 1900, Robinson executed and delivered a general assignment for the benefit of creditors to the defendant Talbot, who duly accepted and acknowledged it. On the following day, the eighth of March, before the assignment was recorded in the office of the county clerk, the plaintiff and the defendant Smith filed in that office their notices of mechanics' liens, and within an hour after the recording of the assignment the defendant Childs filed his notice of lien. It is not disputed that all the liens were filed within the statutory period of ninety days after the completion of the work, nor is any attack made against them except on the ground that at the time they were filed there was no property left on which they could fasten. It is conceded that on the day of the delivery of the assignment there was due by the owner to the contractor a sum in excess of the three liens embraced in this suit.

The claims of the several parties may be briefly summarized: The assignee insists upon his right to the entire fund under an assignment delivered prior to the filing of the first and second liens, although recorded thereafter, on the theory that it was effective from the date of its delivery to pass title to him of all moneys due or to become due upon the building contract and that, therefore, there being nothing due or to become due to the contractor from the owner but only to him as assignee when the notices of liens were filed, these were ineffectual.

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The plaintiff and the defendant Smith maintain that the assignment to Talbot did not vest in him any rights superior to those of the lienors for the reasons that the provisions of section 15 of the Lien Law (Laws of 1897, chap. 418) were violated in that there were not filed in the office of the county clerk copies of the contract and of the assignment.

Finally the defendant Childs contends that irrespective of section 15 of the Lien Law, a general assignment for the benefit of creditors does not operate to cut off the right of materialmen to file mechanics' liens within the period allowed by statute.

Were my conclusions dependent solely on the construction to be given to section 15 of the Lien Law, I should hold that it has no applicability to the case of a general assignment for the benefit of creditors.

The section reads: "No assignment of a contract for the performance of labor or the furnishing of materials for the improvement of real property *or of the money or any part thereof due or to become due therefor*, nor an order drawn by a contractor or subcontractor upon the owner of such real property for the payment of such money shall be valid, *until the contract or a statement containing the substance thereof and such assignment* or a copy of each or a copy of such order, be filed in the office of the county clerk of the county wherein the real property improved or to be improved is situated, and such contract, assignment or order shall have effect and be enforceable from the time of such filing."

On its face nothing could be broader. Kenyon v. Walsh, 31 Misc. Rep. 634. No assignment of the money due under a contract is valid until the contract under which the work is done, and the instrument of assignment are duly filed. If the "no assignment" includes a general one for the benefit of creditors then all the liens would have priority over the claim of the assignee, as concededly no copy of the contract was filed either before or after any of the liens was acquired. The proper construction of this section, however, forbids such inclusion. An ordinary assignment and one for the benefit of creditors have nothing in common save a partial similarity of name. Each belongs to an entirely different group of contracts, and, disregarding words and considering merely the idea, two entirely unrelated concepts result. To constitute an assignment for the benefit of creditors, there must be voluntary transfer by a debtor of all his property

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to an assignee for the payment of his debts (3 Ency. of Law, 6), and in this State the assignee is simply a trustee and not the absolute owner. "The material and essential characteristic of a general assignment is the presence of a trust. The assignee is merely trustee and not absolute owner. He buys nothing and pays nothing, but takes the title for the performance of trust duties." Brown v. Guthrie, 110 N. Y. 435, 441. Such an assignment is not within the purview of the Mechanics' Lien Law. Special mention of that class of transfer when provision is made in reference to it in other parts of the statute indicates the propriety of its exclusion in the section under consideration. §§ 4, 13. The development of decision and legislation clearly show the purpose the Legislature had in view, and, therefore, the proper construction to be placed upon the statute.

The section under consideration was first incorporated into the Lien Law, substantially in its present form, by chapter 915 of the Laws of 1896, which amended section 5 of chapter 342 of the Laws of 1885. Prior to the amendment the courts had often been called upon to decide whether the assignment of a contract or of the moneys to grow due thereunder, or whether an order for the payment of money to be charged against a building contract had validity as against liens subsequently filed. The decisions were uniformly against the lienors. Lauer v. Dunn, 115 N. Y. 406; McCorkle v. Herrman, 117 id. 297; Stevens v. Ogden, 130 id. 182; Beardsley v. Cook, 143 id. 143; Bates v. Salt Springs National Bank, 157 id. 322. In Lauer v. Dunn, where a contractor drew an order on the owner in favor of the subcontractor, and there were no further formalities, it was held to operate as an assignment *pro tanto* of the funds in the owner's hands, and the rule was laid down that where a contractor had assigned his interest in the fund "in good faith and for a valuable consideration" in payment of the claim of a subcontractor, the owner having been notified, no subsequent liens could operate to charge the latter with any further liability.

In McCorkle v. Herrman, *supra*, which involved the question of priority between a receiver of the judgment creditor of the contractor and a lienor under him who had filed his notice of lien subsequent to the service of the order in supplementary proceedings, the court stated more elaborately than had been done theretofore the reasons for the rule denying a preference to the lienor in such cases. "The filing of the notice originates the

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lien. Anterior to this act the laborer or material man has no preferential right to be paid for his labor or material out of the sum which is due from the owner of the building to the contractor, but stands in the same position as other creditors. He may subject the debt to a lien in his favor on filing the notice and taking the proceeding prescribed by the act. But if before this has been done other creditors, pursuing the usual remedies for the collection of debts, have acquired a legal or equitable right to have the debt applied in satisfaction of their claims, the right is not overreached by liens subsequently filed under the act, unless priority is given by the provisions of the act itself." The court adopted the reasoning in Payne v. Wilson, 74 N. Y. 348, to the effect that the lienor acquired a specific lien at the time he filed his notice, that up to that time he was merely a general creditor with no greater equities than other general creditors, and that he was, therefore, bound by all equities existing in favor of those dealing with his debtor.

In Stevens v. Ogden, *supra*, an order drawn by the contractor in favor of a creditor and accepted in payment took priority over a lien subsequently filed. No debt was declared to be owing by the owner when the lien was filed, the order having operated as an assignment *pro tanto* of the fund due or to become due to the contractor. "There is no provision in the statute forbidding a contractor to pay his creditors out of the money due or to become due him from the owner to the exclusion of laborers and material men who have not filed liens. This may be an omission, but if so, it can only be supplied by the legislature, for the courts cannot extend these purely statutory rights beyond the terms of the statute by which they are created." Page 187.

These cases are typical. It is unnecessary to cite further instances of which there are many. However sound their reasoning, it soon became obvious that the construction they gave to existing laws often tended to defeat the beneficial purpose of the Mechanics' Lien Statutes, and that the rules they laid down pointed a way for unscrupulous contractors to enter into fraudulent and collusive schemes to the detriment of those whom the lien laws were primarily designed to protect. Underlying the first Mechanics' Lien Law (Laws of 1830, chap. 330) and subsequent legislation enlarging its scope, is the principle that where a person has by his labor, or by the material he has furnished, contributed to, or enhanced the worth of, real property, he should

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be declared to have an interest in the property to the extent of this value. The decisions cited induced the Legislature to make in one particular, at least, the intended protection to prospective lienors more effective. Hence the requirements of chapter 915 of the Laws of 1896, now embodied in section 15 of the revision of 1897. Inasmuch as a contractor might, without any knowledge on the part of those who have contracted for work under him, dispose by order or special assignment of every dollar due or to become due to him from the owner, with the single qualification that the assignment must be *bona fide* and for value, so that the subsequent lien of the innocent materialman, instead of fastening on to substantial property, would be dissipated into thin air, the Legislature declared before such an assignment or order could have validity against a subsequent lienor it would have to be recorded. The effect of the enactment is to advise at any moment those doing work of the condition of affairs. The filing of the original contract shows the entire amount of the contract, the time and terms of payment, and informs the subcontractor or the materialman of the amount of the fund which represents the maximum interest he can acquire in the property. The filing of the assignment or order indicates the extent to which the fund is or has been depleted, the amount of equity left in the contractor, and thus enables the subcontractor or materialman to take such steps for the protection of his rights as he may be advised.

Without enlarging further, I believe the foregoing outline sufficiently establishes the proposition, with which I prefaced this review, that the assignment contemplated in section 15 is a special assignment for value and does not include a general one for the benefit of creditors, and the assignment of moneys to grow due which is to be recorded is the specific one of moneys under the building contract and does not include those that are carried to the assignee for creditors by virtue of his taking title to all his assignor's property.

Independently of the authorities cited and the course and purpose of the legislation adverted to, a general assignment for the benefit of creditors could not be embraced within the language or object of section 15. If that section means anything, it means that assignments otherwise valid to cut off subsequent liens shall be invalid unless certain formalities are complied with. But I am of opinion, and such authority as there is supports the view,

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that a general assignment for the benefit of creditors is not otherwise valid to cut off subsequent liens. In other words, that in no event does the execution, delivery and recording of such an assignment take precedence over the rights of those who subsequently and within the statutory period duly file their notices of lien. Matter of Christie Mfg. Co., 15 Misc. Rep. 588; Reading Hardware Co. v. City of New York, 27 id. 450; Mandeville v. Reed, 13 Abb. Pr. 173; Smith v. Baily, 8 Daly, 128; Henderson v. Sturgis, 1 id. 336; Oates v. Haley, id. 338; McMurray v. Hutcheson, 59 How. Pr. 210; Boisot Mechanics' Liens, §§ 346, 347; Bish. Insolv. Debt., § 277. And see Masons' Supplies Co. v. Jones, 58 App. Div. 231.

It must not be lost sight of that the lien of the subcontractor or materialman is not asserted against the contractor, nor even against the owner, but against *property*. Lien Law, § 1. The agreement between the subcontractor and the contractor, on the one hand, and between the contractor and the owner on the other, determine the extent to which the lien can be enforced; but its enforcement as a lien, so far from being sought against either, is directed against the land and the building, and that because a certain portion of their value represents the labor of, and the materials contributed by, the subcontractor. The contractor failing to pay his contract-debt, the subcontractor is allowed by statute to enforce his rights against the property improved, to the extent, as it were, of taking out what he has put in it. This right rests on no privity of contract with the owner, for there is none, but is a statutory privilege the granting of which was prompted by broadly equitable considerations. The subcontractor declares his intention of availing himself of that statutory right by filing his notice of lien. That done the property at once becomes answerable for its satisfaction with the single limitation that the amount then remaining due the contractor by the owner is the measure of the burden. If that amount has been reduced by an assignment of moneys by the contractor or by some diligent general creditor securing title to a portion thereof, there is left so much less property to be reached by the lien. It must be perfectly obvious, however, that that particular amount, or the property represented by it, is in no wise lessened by an assignment for the benefit of creditors. The whole, whether in terms of money or property, remains. The assignee is a trustee simply and has only the assignor's title, nothing more.

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He has paid or parted with nothing; the equities existing against his assignor bind him, and if any surplus should result, it is not his, but his assignor's. Whether he receives any money as due his assignor on the building contract is dependent on the same contingency — that there be a surplus after liens filed within the statutory period have been satisfied. The lienor is not, in his capacity of lienor, a general creditor of the contractor. Strictly speaking, he is not his contractor's preferred creditor. He has a preferential statutory right against property of a third person or its money equivalent. All that the contractor and, *ergo*, the assignee can get is the amount left over after the property has answered to the lienor. The argument of the assignee here is based on the cases of McCorkle v. Herrman and kindred authorities, *supra*, while the lienors, apparently accepting the assignee's construction of that case, seek refuge under the provisions of section 15, already referred to. It is clear to me, however, that McCorkle v. Herrman has no application to the case of a general assignment for the benefit of creditors. I have found no case in which a preference was given to an assignee over a subsequent lienor where the assignment was not for value. That, to my mind, is the distinguishing feature. A lienor gets nothing until he files his notice. Up to that time he is merely a general creditor with other general creditors. If the interest he seeks to reach is lessened by the time he asserts his preferential right, by an assignment for value he can reach only what is left. And this is the extent to which the cases have gone. The McCorkle case declared "*creditors*, pursuing the usual remedies for the collection of debts," to have priority where they have acquired a legal or equitable right to have the debt applied in satisfaction of their claims. In Lauer v. Dunn, *supra*, the priority given to the assignment was predicated on "good faith and for a valuable consideration." In Stevens v. Ogden, *supra*, the right to pay "creditors" out of moneys due under a contract before liens are filed was recognized. So in Bates v. Salt Springs National Bank, *supra*, where there was an assignment to a creditor *pro tanto*, and so in all the other cases I have been able to find.

On the other hand, there have been some decisions, under every important lien law since the first, recognizing the priority of a lien duly filed over a general assignment antedating it.

Thus in Mandeville v. Reed, *supra*, decided under the laws of 1830, it was held that a mechanic who had performed labor for

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the contractor upon the building can as well after as before an assignment for the benefit of creditors acquire a right to be paid the amount due him. So too in Henderson v. Sturgis, *supra*, decided under the laws of 1851, the same priority is declared to exist, while in Oates v. Haley, *supra*, a general assignment for the benefit of creditors is recognized as the sole exception to the general rule contended for by the assignee in this case. In McMurray v. Hutcheson, *supra*, decided under the laws of 1875, as amended in 1879, priority was awarded to a subcontractor filing a lien after an assignment for the benefit of creditors and he was declared not to be compelled to share only in the general fund for the benefit of all creditors. In Matter of Christie Mfg. Co., *supra*, arising under the laws of 1885, Mr. Justice Beekman, in a convincing opinion, gave preference to a lienor of a subcontractor — a corporation of which a receiver had been appointed in proceedings instituted for voluntary dissolution — over the receiver, although the latter's appointment antedated the filing of the lien. There is sufficient analogy between a receiver in such a case and a general assignee to make the argument there advanced applicable. Finally, in Reading Hardware Co. v. City of New York, *supra*, Mr. Justice Werner, then sitting in this department, held that inasmuch as the lien was asserted not against the property of an insolvent in the hands of an assignee, but against the property of another with whom the insolvent had contracted, the lien, although filed several weeks after the general assignment was recorded, should have preference.

I am thus led to the conclusion that all the liens in this case have priority over the claims of the assignee. The lienors have a superior title and the amount of their liens must be first satisfied before any surplus can be turned over into the trust estate to be administered for the benefit of all the general creditors. It may be observed that in view of the recent opinion in Mason's Supplies Co. v. Jones, *supra*, some question may exist of awarding any judgment whatsoever in favor of the assignee.

Submit a decision in the usual form directing a foreclosure to the extent of the lien of the plaintiff and of those of the defendants Smith and Childs.

Ordered accordingly.

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THE L. D. GARRETT COMPANY, Plaintiff, *v.* LEVI P. MORTON, Defendant.

(Supreme Court, New York Special Term, May, 1901.)

Corporation — Public policy condemns a directors' agreement to wind up an insolvent fire insurance company without application to the court — Agreement not enforcible in equity by the other party having notice of insolvency.

Where the board of directors of an insolvent fire insurance company having creditors passes a resolution to reinsure its risks, liquidate its affairs, or sell a majority of its stock, and thereafter accepts a proposition from another corporation to buy a majority of the stock and liquidate the affairs, the agreement is void as against public policy as a scheme to annihilate the fire insurance company without dissolution proceedings as required in such case by the Insurance Law (L. 1892, ch. 690, § 41).

Equity, therefore, will not assist the purchasing corporation, having knowledge of the impairment of the capital and of the existence of outstanding fire losses of its vendor, to recover of a mere stockholder thereof, who accepted and was paid its offer to buy his stock, the payment, upon the ground that the vendor's statement to its stockholders of its financial condition and of the fact that all its risks had been reinsured, relied upon by the purchaser, was false and that the stock was either wholly worthless or was worth much less than the purchaser paid for it.

DEMURRER to complaint.

Cardozo & Nathan (Edgar J. Nathan, of counsel), for plaintiff.

William Morton Grinnell, for defendant.

LEVENTRITT, J. This case differs from that of L. D. Garrett v. McComb, N. Y. L. J., Nov. 30, 1900, only in the particular that there the complaint was dismissed at the end of the plaintiff's case, while here judgment for the defendant is sought on demurrer to a complaint identical with that in the earlier suit. Garrett v. McComb was dismissed on two grounds. (1) The illegality of the agreement of which the purchase and sale of stock

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was a part, and (2) failure to prove agency on the part of those whom the plaintiff claimed represented the defendant. On appeal the judgment was affirmed on the latter ground (58 App. Div. 419), the court holding that the proof on the trial was insufficient to connect the defendant. That question is not before me as the complaint contains adequate allegations of agency. On the first ground the material allegations of the present pleading, together with their reasonable intendments, present substantially the situation disclosed at the end of the trial in the former case; I have not attempted to refine for the purpose of holding the complaint proof, at least, against the demurrer, as the plaintiff does not raise the point and seeks a determination of the issues on the merits. After deliberate examination and a careful perusal and consideration of the able brief submitted by plaintiff's counsel, I find myself in accord with the views expressed by Mr. Justice Russell. The court there summed up its conclusion in this language: "An insurance corporation which holds itself out to the public as an insurer, and upon the faith of whose solvency and continued ability and effort to carry out its contracts that public relies, can make no agreement looking to the death of that corporation for the personal benefit of the directors who are consummating such a result. If the corporation was insolvent, it was the duty of its managers to close its affairs in the manner provided by law, and not seek to continue its existence by transfer to another corporation, which was not even an insurance company, and thus relieve themselves of the duties imposed by law upon the trustees of the corporation. That the capital of the company was seriously impaired is beyond doubt, as also that it was in a condition requiring the superintendent of insurance to prevent its obtaining new insurances until the deficiency was met by a further increase of actual capital. The purpose of the sale of a controlling interest in the stock to the plaintiff was to relieve the directors of an unpleasant and vexatious responsibility, obtain as much as possible for those holding stock, and give to the purchaser the power to elect a new board of directors, control the management of the company, and sell with profit to itself the business and good-will of the company either to new stockholders or to another corporation. In the view of this court the transaction was one which cannot be sustained or enforced and is fairly within the lines of the objection stated in the opinion of this court in the case of Wood v. Manches-

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ter Fire Ins. Co., 30 Misc. Rep. 330, the judgment in which was affirmed by the Appellate Division upon the opinion of the Special Term."

Though some of the court's statements are predicated on the facts proved by the plaintiff, an analysis of the complaint before me, which is to be taken as true, justifies every essential conclusion.

It appears from the pleading that the board of directors of the Traders' Fire Insurance Company, of which the defendant was a stockholder, resolved to reinsure its fire risks and to *liquidate* the affairs of the company or to sell the stock held by the individual stockholders. Pursuant to such resolution the board requested the plaintiff to submit to it a proposition for the *liquidation* of the company and for the purchase by the plaintiff of its stock. A statement was submitted to the plaintiff purporting to set forth the assets and liabilities of the Traders' Company. On its face this statement showed an impairment of the capital amounting to almost forty per cent. Relying on the statement and the representation of the directors the plaintiff made a proposition for the purchase of the capital stock, provided, not less than sixty-five per cent. should be transferred, agreeing to pay either twenty-five dollars cash per share, absolutely, or forty dollars, less such proportionate sum as it should be obliged to pay on account of outstanding fire losses, not included in the statement submitted and for some reason not even placed upon the books of the company, but which losses the plaintiff specifically agreed to pay in any event. In a circular letter addressed to the stockholders the directors notified them that all of the risks of the company had been reinsured, and, that taking measures for the "*winding* up of the company, * * * and after careful consideration of the condition of the company" negotiations had been had with the plaintiff resulting in the offer already stated. The defendant accepted the plaintiff's offer of twenty-five dollars per share, and received two thousand dollars for his eighty shares of stock. The plaintiff now claims that the statement was false and untrue, that in place of there being only a forty per cent. impairment of the capital stock "the funds representing said capital stock were entirely exhausted and the assets were wholly insufficient to meet the liabilities of said Insurance Company to its creditors", and that the company as of a date anterior to the institution of any negotiations with the plaintiff was

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wholly insolvent, and that the stock which the plaintiff purchased was either wholly worthless or of a value greatly less than twenty-five dollars per share. The balance of the complaint shows that there are creditors of the Traders' Company and sets out formal allegations necessary to recovery from the defendant.

The entire agreement between the plaintiff and the Traders' Insurance Company or its stockholders is not in terms averred. Emphasis is merely laid on the item of the purchase and sale of the stock, and of the assumption by the plaintiff of that portion of the outstanding fire losses not stated on the books of the company. But the entire pleading with its permissible inference leaves little doubt as to its general nature. Reduced to its lowest terms the complaint resolves itself into a scheme to end, through the conscious instrumentality of the plaintiff, the political life of the Traders' Insurance Company at a time when it was insolvent in law, which the plaintiff knew, and insolvent in fact, which it claims it did not know, and as to which it asserts the false representations.

The complaint discloses much more than an agreement for a mere purchase and sale of stock. The directors not only resolve to reinsure all the risks of the company in itself, the clearest indication of an intention to abandon business — but determine to "liquidate" its affairs. The plaintiff then alleges that it was requested to submit a proposition for the "liquidation of said Traders' Insurance Company and for the purchase * * * of the stock." In its general sense liquidation means "the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and apportioning the amount of profit or loss." 3 Cent. Dict. 3474. There can be no doubt, under the unmistakable inference of the pleader's allegations, that it accepted the proposition to liquidate and to purchase the stock. It alleges the details concerning the stock transactions, and omits allegations of the liquidation agreement, except to the extent already stated. It is clear, however, that the offer to liquidate was accepted, and that both the reinsurance — on its face, by the Traders' Company itself — and the stock deal were incidents of the general scheme. Were there any doubt about this it would be set at rest by the circular letter to the stockholders in which the plaintiff's alternative offer is submitted as one of the necessary measures for the "winding up" of the company.

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So far as the directors of the Traders' Company were concerned, I am of the opinion that their action was illegal, not merely in the sense that the contract was unauthorized or beyond the legal capacity of the corporation, but that it was void as against public policy. Bath Gas Light Co. v. Claffy, 151 N. Y. 27, 35. It may be conceded at the outset that a purely private corporation has the right when its business has become unprofitable to discontinue operations for the purpose of protecting its shareholders (Skinner v. Smith, 134 N. Y. 240; Denike v. N. Y. & R. Lime & Cement Co., 80 id. 606), and that if resumption would be impossible or impracticable it would even become their duty to institute legal proceedings for the dissolution of the corporation. Jameson v. Hartford Fire Ins. Co., 14 App. Div. 380, 385. But whether or not a strictly private corporation without larger relations to the general public may, in the event of its reaching a nonpaying basis, accomplish practical destruction by its own act (People v. Ballard, 134 N. Y. 269, 294; 136 id. 640), I hold that this company could not — and that the statutory method provided where dissolution became imperative was and is exclusive. The complaint admits the Traders' Company to have been wholly insolvent. It is apparent on the face of the pleading that the capital stock was impaired forty per cent. One of two alternatives was open to the directors: To make good the deficiency in accordance with the provisions of the Insurance Law, or terminate the affairs of the company. The policy of the law is, where the capital stock of an insurance company is impaired even to the extent of twenty-five per cent., whatever the condition of the company may be in other particulars, to deem it insolvent and have the Attorney-General institute proceedings for its dissolution, unless the impairment is made up within a limited period. Ins. Law (Laws of 1892, chap. 690), § 41. The law requires that under those circumstances no further insurance shall be accepted until the company is again on a basis deemed to furnish adequate protection to the general public dealing with it. The directors did not make good the deficiency, but decided to dissolve. Call it by any name — winding up, liquidating, transferring stock or assets — the end in view remains the same. The purpose was to terminate effectually the existence of the Traders' Company as an independent insurance corporation, to extinguish its life without applying to the court and without subjecting its affairs and business methods to proper legal investigation and

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scrutiny, with the possible consequent rigorous liability of its managers. The life of this corporation, in the absence of some express statutory provision which is not to be assumed on the pleading before me, could be ended only by law; its eyes could be closed only by the courts. While it might suspend its business activities, and become entirely dormant so far as the exercise of any of its chartered functions is concerned — conceding that the Attorney-General or the Superintendent of Insurance had not stepped in — its life would continue until its charter period expired or the court decreed a dissolution. Hitch v. Hawley, 132 N. Y. 212; Geneva Mineral Spring Co. v. Coursey, 45 App. Div. 268, 275; People v. Ballard, *supra;* Brooklyn Steam T. Co. v. City of Brooklyn, 78 N. Y. 524, 529; Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. 84. The dictum in Mr. Justice Barrett's concurring opinion in the Jameson case, *supra,* is not in conflict with these views. In that case dissolution proceedings had been instituted and a contract of reinsurance of all the outstanding risks made, and a transfer of certain property as a necessary incident to it. The court refused to restrain the transfer, holding that, in view of the financial standing of the company, the directors were justified in seeking legal dissolution and protecting the shareholders by the contracts in question. It is nowhere stated in the opinion that the dissolution could be consummated without a decree of the courts. The misapplication referred to of the doctrine that the statutory method of effecting dissolution is exclusive has bearing on the power of directors to do certain acts prior to or pending dissolution proceedings without authority of the courts. Had dissolution proceedings been instituted in this case the plaintiff's contention that a director while retaining his trust position might negotiate a sale of the stock would be unassailable. Here, however, the stock sale is merely an incident in the purpose to kill the corporation by giving the plaintiff at least sixty-five per cent. of the stock and thus control of the corporation. It was merely a part of the plaintiff's offer to "liquidate" the company's affairs. What ultimate form the scheme of corporate annihilation was to take I may not speculate upon. It is sufficient for the purpose of this decision that the directors' acts had, in effect, however glossed over by polite language, this end in view, and that the plaintiff was a party to it.

Nor was the plaintiff an innocent party. It was apprised

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that the company's capital was impaired to an indefinite extent. A forty per cent. impairment is conceded on the face of the statement on the basis of which the offer to liquidate was made. But the assumption of the outstanding fire losses not entered on the books, shows a knowledge of further liabilities undetermined in extent. The plaintiff was charged with a knowledge of the law, and if the company's purposed "liquidation" was illegal as against public policy, it cannot invoke the aid of a court of equity because it claims to have been overreached in the joint promotion of an unlawful scheme.

It is quite true that the Traders' Company was not a public nor even a quasi-public corporation. It owed no duty to the public like a railroad or a telegraph company or similar concerns, nor did it exercise any peculiar and exceptional privileges, so that in the event of its refusal to carry on its business it might be compelled to fulfill its duty to the public by mandamus. Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 34. It is, nevertheless, erroneous to say that its official acts and contracts have no relation to the public or may not affect that public prejudicially. The elaborate provisions on our statute books furnish the completest answer to such a proposition. In its relations to the public it stands on quite a different footing from an ordinary manufacturing corporation, which has relations ordinarily only with the limited portion of the public requiring its particular commodity. It is hardly too broad a proposition, however, to lay down that every property-owner is an insurer against fire. So large a proportion of the community has dealings with insurance companies that the Legislature has seen fit to enact laws governing this class of business as distinguished from others. The generality, magnitude and diversity of interest involved have led to the imposition of rigorous conditions in exchange for the privileges granted under the charter. The stringent State supervision and the many safeguards embodied in the Insurance Law, conditions precedent to corporate origin and continuance, have the one aim in view, the adequate protection of the insuring public. When an absolutely arbitrary test as to solvency is laid down as it is in section 41, the object in view can be but the single one, namely, that a company failing to meet it, independent of any question as to the actual relation between assets and liabilities, shall not be allowed to hold itself out to the public as a vital, going concern.

The policy of the law is that such a concern shall cease busi-

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ness if it fails to make good the deficiency. Had the directors of the Traders' Company done nothing more their action would have been unexceptionable. According to the complaint the directors decided to wind up and not repair the impairment. The duty was cast upon them as directors, in their fiduciary capacity to do this. They could not delegate the task, thereby escaping their responsibility to the State, to creditors and to nonassenting shareholders. It is not correct to say that no question as to creditors is involved in this case; the very statement rendered to the plaintiff shows the contrary; merely a portion of the creditors — those covered by the reinsurance — have no cause for objection. Instead of performing their duty in the manner provided by law the directors adopted an illegal method, with apparent ulterior motives. The company had sunk to a condition where the managers knew that the public policy of the State, as expressed in its statutes, commanded the arm of the law to fasten upon it. A consummated agreement with the plaintiff, the effect of which, however expressed, was to transfer to it all the substance of the body corporate, cannot be countenanced. It was incumbent on them to apply to the court for dissolution. That method to effect the end in view was, under the circumstances, exclusive. The plaintiff was in *pari delicto* with them and has no standing in this court for relief.

Demurrer sustained.

FRANK CRAMER, GEORGE S. HAMLIN and WILLIAM L. PORTER, as Executors, etc., of HARRIET C. PORTER, Deceased, Plaintiffs, *v.* GEORGE H. CRAMER et al., Defendants.

(Supreme Court, Saratoga Trial Term, May, 1901.)

Legacy — Lapse — Specific legacy upheld by intention as derived from the whole will.

A specific legacy fails and the property bequeathed falls into the residuum where the testatrix makes the particular dispositions dependent on a memorandum to be made by her of even date with her will but which memorandum she in fact never made.

Bequests, in amounts named, "of the following stocks and bonds now held by me (the testatrix)," enumerating them, and bequests of

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the sum of ..... dollars, par value of certain capital stock, enumerating it, are not sufficient in form to make the legacies specific, but will be so construed where, in other parts of her will, the testatrix refers to the stocks and bonds in the plural, guards them against inheritance taxes, prohibits her executors from selling them, and declares that, if sold in her lifetime, the legatees shall have in money what the securities would have brought at the time of her death.

ACTION for the construction of a will.

C. A. Waldron, for plaintiffs.

Edward Murphy, 2d, Guardian *ad litem*, for infants George H. Cramer and others.

William Shaw, for defendant LeGrand C. Cramer.

Hun, Johnston & Hand, for defendant Mary C. Johnston.

HOUGHTON, J. Two questions are involved. The first is with reference to the twenty-second clause, by which the will bequeaths certain paintings, bric-a-brac, jewelry, etc., in accordance with a memorandum bearing even date with the will, to which the testatrix refers.

The memorandum was never made, and hence the attempted transfer of this property fails. There is a general residuary clause, however, broad in its terms, and the property attempted to be transferred by this provision passes to the residue and forms a part of the remainder of the estate.

The second question is with reference to the bequest of certain stocks and bonds. The testatrix at the time of making the will and at the time of her death owned a large amount of bonds and railroad and other stocks, more than sufficient to meet the particular bequests, if they be adjudged specific.

There are ten clauses of the will referring, in terms, to certain stocks. The language of the first clause, referring to that subject, is more direct and specific than any of the others, and contains a bequest of the amounts named " of the following stocks and bonds now held by me ", enumerating them. The language

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of the succeeding bequests is the sum of dollars, par value of certain capital stock, enumerating it.

The controversy arises because of the peculiar language contained in these bequests.

Standing alone this language would not be sufficient, I think, to authorize the court in holding that the testatrix had succeeded in giving the specific stocks to her legatees; but there are other clauses of the will which, I think, clearly show that the testatrix intended to make specific bequests of these stocks.

It is true that it is a rule of construction that a legacy will be deemed general rather than specific. This arises from the fact that unless there be a clearly expressed intention of the testator to give a specific thing, that it ought to be considered as a general legacy, because a testator is presumed to treat all his beneficiaries alike, and that if there is necessity for abatement all should equally bear the burden. No question of this character, however, arises in this case, because there is a large amount, however the will may be construed, that passes to the residuary estate. But that fact does not affect the rule of construction that ought to be applied. However strict the technical rule of construction may be, it must yield to that one which is the foundation of all interpretation of wills, that the intention of the testator must govern. In speaking of arbitrary rules for the construction of the provisions of a will, Gray, J., in Matter of James, 146 N. Y. 103, says: "In every case, in this, or any other state, however stringently that rule (converting perishable securities into legal investments instead of retaining in specie, as between life-tenant and remainderman) is applied as between a tenant for life and remainderman, it is the absence of manifest or plain intention which sets it in operation."

Whether a legacy shall be considered specific depends upon the intention of the testator to be derived from the language used in the bequest, construed in the light thrown upon it by all the other provisions of the will. Davis v. Crandall, 101 N. Y. 319; Matter of Mitchell, 61 Hun, 372; Matter of Hastings, 6 Dem. 307.

Adverting, therefore, to the other portions of the will throwing light on the particular bequests, we find that the testatrix, in the second clause, uses this language: "I direct my executors to pay out of the principal of the residuary portion of my estate, all inheritance taxes on the various bequests herein contained, so that said taxes shall not in any case be deducted from the specific

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bequests, or any of them." And further, in the third clause: "In case any of the securities herein devised specifically should be disposed of before my death, I authorize and direct my executors to pay in lieu thereof to the beneficiary named, such sum or sums in cash as would equal in value such securities, respectively, if estimated at the current market price of the same at the date of my death, as near as may be." And again, in the fifth clause: "I hereby grant and give to my executors full power and authority to sell any and every portion of my real and personal estate, except such portions as are herein specifically devised."

The misnomer involved in the word *devised* does not change the meaning of the testatrix or indicate that she failed to understand the provision. The interchange of the words *bequeathed* or *devised* is of no moment where the intention of the testator is plain. Matter of White, 125 N. Y. 551.

These various provisions make it clear, I think, that the testatrix intended the stocks which she mentions in the various clauses to pass in kind to the various legatees. She refers to them in the plural. She is careful to guard them against the burdens of taxation, and prohibits her executors from selling. In case she shall dispose of them herself, she is careful that the legatees shall have in money what the stocks would have brought at the time of her death.

The conclusion is irresistible that, however inartificial her language may have been, the testatrix desired the stocks and bonds, which were of a high order of securities, to pass to her various legatees.

This is not contrary to the case of Tifft v. Porter, 8 N. Y. 516, cited by the plaintiff. In the will there under consideration there was no extrinsic language from which the court could say that it was the intention of the testator that the legacy should be specific, and it applied the strict rule and held the legacy to be general.

With reference to the Lake Shore stock, I think the bonds representing it passed to the legatee. The stock was not sold by the testatrix; only a new security was taken growing out of the stock and representing it.

A decree may be drawn in accordance with the above.

Ordered accordingly.

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Matter of the Judicial Settlement of the Account of PETER ROSE, as the Executor of the Last Will and Testament of PHILIP B. ROSE, Deceased.

(Surrogate's Court, Rensselaer County, May, 1901.)

Gift inter vivos — Avoided by donor's retention of control — Code C. P., § 829.

A testator deposited, nine months before his death, money in a bank in his own name, "In the event of death payable to Peter Rose," his executor and brother and who was with him, and at the same time filed an order with the bank directing payment to Peter in case of his own death. He also had said to the bank officials "I want my brother Peter to have this money." Fifteen minutes after the deposit but before the parties had left the bank, the testator gave Peter the bank book and said, "There is the book and there is your money."

Held, that the gift must be treated as one *inter vivos*, that the testator evidently intended to retain control of the deposit during his life, that the gift was conditional and therefore void as a gift, and was not enforcible as a trust, for Peter, either in the bank or in the testator.

Where a special guardian for infant legatees seeking to surcharge the accounts of the executor by the amount of the bank deposit, cross-examines the executor as to the transaction of gift, the executor is entitled to prove the whole transaction and conversation had by him with the testator, although part of it occurred fifteen minutes after the deposit but before the parties had left the bank.

PROCEEDINGS upon the judicial settlement of the account of an executor.

J. A. Cipperly, for executor.

Clarence W. Betts, special guardian of infant legatees, contestants.

COMSTOCK, S. The contestants, who are grandchildren of the testator and residuary legatees under his will, appear by their

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special guardian and object to the account on file, in that it does not include, as an asset of this estate, a certain deposit of $2,000, made by testator, in the Powers Bank of Lansingburgh, and which remained there until his death, and they ask that the account be surcharged in that amount with interest. The executor claims the same was given to him by the testator in his lifetime, and hence that it comprises no part of his estate. The special guardian in order to maintain his contention called the executor as a witness and proved by him that he and his brother, the testator, on the 19th day of September, 1898, which was nine months before the testator's death, went to Schenectady to draw some money which was coming to the latter from the estate of his deceased wife. That the sum then received was $2,000. That on their return home they went to a bank in Lansingburgh. The witness then details what occurred then, as follows: "He (meaning testator) stepped up and said he wanted to put $2,000 in the bank there and asked them if they would receive it and they said they would. He told me to hand it out and give it to them and I did so; and he says to the officials of the bank, 'I want this put in here for my brother Peter', and they says 'all right, do you want it put in jointly?' 'No,' he says, 'I want it put in so that he will get it in case there should anything happen to me.' He says, 'I want my brother Peter to have this money', and they put it in the bank and gave the book to him and he handed the book to me and says, 'there is the book and there is your money.'"

It subsequently appeared, on his cross-examination, that the book was not handed to him, nor the remark, "there is the book and there is your money," made, until fifteen or twenty minutes after the deposit, and when they were standing in the front part of the bank on their way out to the street. No motion was made to strike this evidence from the record after it appeared that the occurrence did not take place until some fifteen or twenty minutes after the deposit, and hence under the stipulation of counsel that my decision might be reserved (see Rogers v. Rogers, 153 N. Y. 343–348), I will allow the evidence of the executor as to what occurred in the front of the bank to stand and deny the motion to strike out. A part of what was then said and done having been brought out, or allowed to stand upon the record by the contestants, the other side is entitled to the whole conversation and transaction (Merritt v. Campbell, 79 N. Y. 625;

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Nay v. Curley, 113 id. 575), and I am strongly inclined to believe that the testimony as to what took place between these men, while they were still in the bank, was competent as part of the transaction and business which brought them there. Their purpose was twofold: one was to make this deposit; the other, as manifested by the form of the deposit and order signed by the testator, was the gift to Peter. It is undoubtedly true that the conversation and delivery of the bank-book in the front part of the bank was no part of the act of making the bank a depositary for that was then finished and completed. Testator had thereby gone as far as he then could to evince what his intention was in respect to a gift to Peter. The occurrence at the bank window was intended to be not only a transaction of deposit, but also a transaction of gift in the form and manner expressed by the said entry in the bank-book and the said written order. The latter element in this twofold transaction was not complete, as they understood it, until by the occurrence in front of the bank fifteen or twenty minutes after they had left the teller's window. If what then occurred had taken place at the window, immediately upon the testator's receiving the book, there could be no question as to the competency of the evidence, as one entire transaction. As I have said it was no part of the same transaction of depositing the money, but it was a part of that transaction so far as it related to a gift.

But with this evidence left standing and giving it full force, I can see no escape from the conclusion, as a matter of law, that no gift has been established. The deposit was made by the testator in his own name, "In the event of death payable to Peter Rose". The order which was signed by testator and filed with the bank when the deposit was made reads:

"LANSINGBURGH, N. Y., *September* 19th, 1898.

"Bank of D. Powers & Sons: In the event of my death please pay deposits in pass-book No. 8062 in your bank to Peter Rose.

"PHILIP B. ROSE."

This order and form of deposit show clearly what the testator's intention was at the time; it was only "in event of his death" that the same was payable to Peter. Certainly nothing had occurred prior to this deposit upon which a gift of the money could be predicated; Peter, in testifying to what took place at

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Schenectady, says: "He handed me the money and I counted it over to see whether it was all right. After he was satisfied it was all right he gave me the money and I counted it over to see whether it was all right. I said to him it was all right, it was $2,000 and then he says: 'Well, put it in your pocket', he says, 'you can carry it', so I put it in my pocket and the last roll was so big I couldn't get it in without showing pretty plain. He says, 'May be I can get that in my own'. He took that in his pocket and we started for Troy".

The money was handed to Peter merely to "carry it", and one roll was immediately returned to testator and remained in his possession until they got to the bank in Lansingburgh. "He asked me which bank to put it in and I told him the Powers Bank in Lansingburgh, and we went up there". At the Powers Bank, testator, in the presence and with the acquiescence of Peter, made the deposit in his own name, thereby exercising full authority over the money as owner, saying that he did not want it in their joint names but "I want it put in so that he will get it in case there should anything happen to me", hence, down to and at this time testator was the recognized owner, and the understanding of each was that Peter, only in the event of testator's death, was to have it. This is emphasized by the declaration of testator that he did not want it in their joint names, in other words, he did not want it so deposited that Peter could draw it during his, testator's, lifetime. It is true that he said at that time, "I want my brother Peter to have this money", but this must be considered in connection with what he had just said, and with the form of the deposit, that is to say, he wanted him to have it in event of his death and not otherwise. If he had wanted to make an immediate gift he could have done so and allowed Peter to do as he pleased with it, deposit it or not, or he, himself, could have deposited it in Peter's name; that was not his purpose, he did not want it so that Peter could draw it while he, himself, lived. Every circumstance shows that his purpose was to retain control over the deposit so long as he lived; this is evidenced not only by the form of the deposit, but by what testator said at the time thereof. The case of Sullivan v. Sullivan, 161 N. Y. 554, is quite similar to the one under consideration. In that case Catherine Sullivan deposited in the Chemung County Bank $2,000, "payable one day after date to the order of herself, or in case of her death to her niece, Catherine

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Sullivan". Judge Werner, after referring to the contention that a trust was created either in the bank or the depositor, says: "The inherent weakness of both of these propositions lies in the fact that in the transactions between plaintiff's intestate and the bank there was no immediate and fixed change of title to the fund. There was no intention, either expressed in terms or to be implied from the nature of the transaction, to immediately transfer the title of the fund to the defendant, or to the bank, except as the depositary and debtor of the depositor. This is the essential difference between the position of the defendant and the *cestuis que trust* in the cases cited in support of her contention." As was said by Chief Judge Church in Martin v. Funk, 75 N. Y. 138, "Enough must be done to pass the title, although when a trust is declared, whether in a third person or the donor, it is not essential that the property should be actually possessed by the *cestuis que trust*, nor is it essential that the latter should be informed of the trust. * * *

"The defendant acquired no rights *in praesenti;* she was to acquire them *in futuro.* This is the test which marks the essential difference between a valid gift *inter vivos*, or an effectual parol trust, and the mere expressed desire or intention to do that in the future which can only be done by will." See Markey v. Markey, 38 N. Y. St. Repr. 173, as to such a deposit being an attempt to make a testamentary disposition of property. In Gannon v. McGuire, 160 N. Y. 476, the *per curiam* opinion says: "The essential element of a gift *inter vivos* is the delivery by the donor of the subject of the gift with the intent to at once vest title thereto in the donee. Mere words of gift are not enough, for the owner must part with possession and control before the gift can take effect. There must be an intent to make the gift *in praesenti*, because a gift to take effect *in futuro* is void as a promise without consideration".

"An absolute gift requires a renunciation by the donor and an acquisition by the donee of all interest in and title to the subject of the gift". Curry v. Powers, 70 N. Y. 212.

"There must be a delivery of possession with a view to pass a present right of property. 'Any gift of chattels which expressly reserves the use of the property to the donor for a certain period, or as commonly appears in the cases which the courts have had occasion to pass upon, so long as the donor shall live, is ineffectual'". Young v. Young, 80 N. Y. 422, 436.

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In the case of O'Connell v. Seymour, 53 N. Y. Supp. 748, Judge Follett, in writing the opinion of the court, says: "He who attempts to establish title to property through a gift *inter vivos*, as against the estate of a decedent, takes upon himself a heavy burden, which he must support by evidence of great probative force, which clearly establishes every element of a valid gift,— that the decedent intended to divest himself of the title in favor of the donee, and accompanied his intent by a delivery of the subject-matter of the gift."

In this case there was, as hereinbefore stated, a delivery of the bank-book, but it was merely a delivery of a gift which was not to take effect, and the possession of which was not to pass until the donor's death, unless there was then expressed by him an intention to make the gift immediate or *in praesenti*. There must accompany the act of delivery an intention on the part of the donor to thereby divest himself of the title and to then make the gift absolute, and that such was the intention must be clearly established by the donee.

If such was not his intention, the gift was not effectual for it was conditional only and fails to satisfy the legal requirements. It must be remembered that this deposit had been made but a few moments before, they were yet in the bank, testator had just declared that he did not want the deposit in their joint names, but that he wanted it in his name, and in the event of his death payable to Peter, and it was thus made. He seems to have been quite particular about it and to have known definitely just what he wanted. If, when he subsequently handed the book to Peter, with the remark "there is your book and there is your money", his intention had suddenly undergone a change, the inquiry naturally suggests itself, what caused it; certainly nothing had been said by either indicating any purpose to change this gift from one *in futuro* to one *in praesenti*. I am satisfied that the delivery of the pass-book was intended to be a delivery merely of a gift which was not to take effect until after the death of the testator and was not intended as a delivery of a gift to take effect immediately. This view is further borne out by the fact that at the time of the said deposit testator's property was only about $3,500, including the said $2,000, and there is no well-defined reason shown why he should prefer his brother Peter to the extent claimed by him and whereby his property would have been reduced to about $1,500. Testator had a son at that time living

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and the said grandchildren, and so far as appears to the contrary their relations were pleasant, in fact, he made the said grandchildren his residuary legatees. Also on the 12th day of May, 1897, the year before this alleged gift, he executed his will, which has since been admitted to probate, whereby he appointed Peter his executor, which fact may have had a bearing upon his mind at the time he made the deposit which postponed the payment to Peter until after his, testator's, death.

This case must be disposed of on the theory of a gift *inter vivos*, no trust was created either in the bank or the testator for the benefit of Peter.

The account of the executor should be surcharged with the amount of the said deposit and interest.

Let findings be prepared accordingly.

Decreed accordingly.

FANNY M. BERNARD-BEERE, Appellant, *v.* MARC KLAW and ABRAHAM L. ERLANGER, Impleaded, etc., Respondents.

(Supreme Court, Appellate Term, May, 1901.)

Bond of indemnity — Not to be varied by parol.

Liability under a bond of indemnity cannot be extended by parol evidence.

Bernard-Beere v. Klaw, 32 Misc. Rep. 765, affirmed.

APPEAL from affirmance by the General Term of the City Court of the city of New York of a judgment, entered upon the dismissal of the complaint.

In 1892, the plaintiff, an English actress, came to this country under a contract with the defendant Mayer, a theatrical manager, for a tour during the theatrical season of 1892-93. After a time and mutual discussion, said parties agreed to cancel their contract upon a settlement between themselves. One of the topics discussed and one of the elements of the settlement was a claim made by Mrs. Bernard-Beere that she was under a contract with Mr. Charles Wyndham to produce in this country during that season a certain play named the "Fringe of Society", belonging to said Wyndham, for at least fifty performances at a certain percentage of the gross receipts to be paid to him, and for

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such performances as did not take place twenty-five dollars per night, and she claimed that inasmuch as her contract with Mayer was to be abrogated and she could not present the fifty performances of that play she would be liable to Wyndham in the sum of $1,250, and demanded that that sum be paid to her to liquidate Wyndham's claim against her, in addition to the other tax terms personal to herself. As the result of such negotiations, on the 8th day of December, 1892, the following paper was executed:

"Whereas, Mrs. Bernard-Beere claims that she may be or become liable to Charles Wyndham in the sum of Twenty-five dollars a performance for fifty performances of the play entitled 'The Fringe of Society' to be given in a tour of America, during the season of 1892 and 1893, on a paper writing of which the annexed is a copy. And Whereas as a condition for the cancellation of an agreement between Marcus R. Mayer and the said Mrs. Beere, she requires that she be indemnified and held harmless against and from the payment of the said amount due or any other amount which may become due to the said Charles Wyndham thereunder,

"Now, in consideration of the premises and of the sum of one dollar to us in hand paid by the said Mrs. Bernard-Beere, the receipt whereof is hereby acknowledged, we do hereby jointly and severally promise and agree to and with the said Mrs. Bernard-Beere, that we will and hereby do indemnify and hold her harmless against and from the payment of any sum of money to the said Charles Wyndham, under or by reason of said contract."

This was signed, sealed and acknowledged by all the defendants. Attached thereto was the following, alluded to in the first paragraph as "a paper writing of which the annexed is a copy"— "Charles Wyndham: I agree to take the Fringe of Society for a tour in America this year of 1892 and 1893. I will pay three per cent of gross receipts for each performance — weekly settlement. I guarantee you at least fifty performances during said tour, or failing that number, will pay you three per cent of gross receipts for such performances as take place, and for the balance at the rate of twenty-five dollars per performance. I will not part with this right to the piece without your permission or being understood that it is reserved for me. October 11th, 1892." The complaint alleged that "thereafter and on the 7th day of December, 1894, under and by reason of the said contract referred to in this said bond, this plaintiff was compelled to and

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did pay to the said Charles Wyndham $1,250, had demanded the repayment of said sum from the defendants, who had refused payment, and it demanded judgment therefor."

To sustain the issues, plaintiff offered testimony tending to show the facts and circumstances surrounding the making of this bond of indemnity, the existence of a contract between the plaintiff and said Wyndham upon the precise terms set forth in the "paper writing" attached to the bond, the payment to Wyndham by plaintiff of $1,250 in accordance with the terms of their contract and the facts and circumstances of that payment.

All of this testimony was excluded.

The complaint was dismissed and the judgment entered thereon was affirmed on appeal by the General Term of the City Court.

Howe & Hummel, for appellant.

Mitchell L. Erlanger, for respondents Jefferson and others.

Dittenhoefer, Gerber & James, for respondent Mayer.

Per Curiam. The bond of indemnity in terms restricted the liability of the defendants to the amount which the plaintiff might be called upon to pay under a written contract. The obligation could not be enlarged in an action brought to enforce the stated liability, and the sole purpose of the evidence, excluded at the trial, was to show the existence of a contract not covered by the bond in suit.

Doubtless, a reformation of the instrument, to express the intention of the parties, might have been obtained in an action brought for that purpose in a court having jurisdiction to grant the appropriate relief, but, having elected to sue upon the instrument as it stands, the plaintiff has invited defeat and has left us no alternative but to affirm the judgment.

Present: Bischoff, P. J., Leventritt and Clarke, JJ.

Judgment affirmed, with costs.

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JOHANNA DIERIG, Appellant, *v.* JULIA A. CALLAHAN, Respondent.

(Supreme Court, Appellate Term, May, 1901.)

A covenant to surrender is real — Against assigning a lease, when broken — Review of judgment by Appellate Term.

A covenant to surrender premises for a consideration, if the landlord sells during the term, is a covenant real and is enforcible by an assignee thereof; and it is not a defense to his action for the consideration of surrender that the defendant landlord failed to consummate the sale.

A covenant against assigning a lease is not broken by an assignment thereof unless the landlord re-enters.

A judgment of affirmance made by the General Term of the City Court of the city of New York is properly brought to the Appellate Term for review by an appeal from the judgment only, as no appeal lies from the order of affirmance, the same being interlocutory.

Dierig v. Callahan, 34 Misc. Rep. 218, reversed.

APPEAL from a judgment of the City Court of the city of New York, at General Term, which affirmed a judgment for the defendant rendered at a Trial Term of the same court upon a verdict directed in her favor.

Action by the assignee of a lease to recover the sum covenanted to be paid by the lessor upon surrender of possession of the demised premises before expiration of the term.

George C. Coffin and Frederick H. Kellogg, for appellant.

Alfred Steckler, for respondent.

Per Curiam. The lease was of the store No. 411 Canal street, in the city of New York, and was made by the defendant to one Lina Kiehl, whose interest, as lessee, passed by intermediate assignments in writing to the plaintiff, and this action was brought by her to recover upon the lessor's following covenant: "It is hereby covenanted and agreed between the parties hereto that in case the premises hereby leased shall be sold by the said party of the first part during the term of the written lease, and the purchaser shall demand possession thereof at any time prior to the expiration of the term herein specified, the said party of the first part shall pay to the said party of the second part the sum

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of $500 in full compensation for violation of this lease, and on written notice of thirty days, and the payment of the said sum to the said party of the second part she will deliver possession of the premises to the party of the first part." It was shown and conceded upon the trial that a notice such as the covenant called for was given, and that in compliance therewith the plaintiff surrendered the premises and removed therefrom some days after the expiration of thirty days immediately succeeding the time of the service of the notice upon her. Obviously, upon this state of facts, she was entitled to judgment and it was error to direct a verdict for the defendant.

That this was a covenant real, enforcible by the assignee of the term, seems an indisputable proposition when it is considered that it, in effect, provided for the lessor's purchase of the remainder of the term, the payment being intended to take the place of the further use of the premises demised, and the plaintiff having, in compliance with, and reliance upon, the notice given her that the premises were sold, and that the purchaser wished for possession thereof, quit and surrendered the same, the defendant was estopped from successfully availing himself of the circumstances that the sale alluded to in the notice was not consummated.

Nor was the defendant aided by the fact that the plaintiff's actual surrender of possession of the demised premises did not occur until some days after the expiration of the thirty days immediately succeeding her receipt of notice. The covenant did not obligate her to remove *within* the thirty days, and it was, therefore, satisfied on her part by her removal within a reasonable time after the expiration of that period. But, be that as it may, certain it is, from the covenant, that she was entitled to remain in possession until payment to her of the sum agreed. Two things were thereby required of the defendant as conditions precedent to any right to the plaintiff's removal, the giving of a previous notice of thirty days, and the payment of $500, which latter the defendant omitted.

Again, the judgment is not to be supported because the lease provided against an assignment thereof without the written consent of the defendant, under penalty of forfeiture and damages. There was abundant evidence which tended to show the defendant's oral consent at the time of the plaintiff's purchase of the lease, and therefrom a waiver of this restriction would result.

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In any event, therefore, the plaintiff was entitled to have the question of the defendant's consent submitted to the jury, as requested by her counsel. But, aside from the fact that forfeiture of the lease, because of the assignment thereof, was not pleaded, the omission of the defendant's consent was immaterial, since it is elementary that an assignment of a lease, in violation of restrictions such as here appear, is, nevertheless, effectual, unless avoided by the lessor's re-entry. None such appeared or was claimed on the trial. Wood, Landl. & Ten., § 323, p. 530, and cases cited in note 6.

There is no force in the respondent's contention that this appeal is not maintainable because not taken from the order of affirmance, as well as from the judgment which was entered pursuant to that order. The case cited by counsel (Waltenberg v. Bernhard, 27 Misc. Rep. 795) is direct authority that the appeal was properly taken from the judgment only. The order alluded to is wholly of an interlocutory character, and, so, not appealable. Whitfield v. Broadway & Seventh Ave. R. R. Co., 16 Daly, 288.

The judgments of the General and Trial Terms of the court below should be reversed and a new trial ordered, with costs to the appellant to abide the event.

Present: BISCHOFF, P. J., LEVENTRITT and CLARKE, JJ.

Judgments of General and Trial Terms reversed and new trial ordered, with costs to appellant to abide event.

CHARLES A. FARMER, Respondent, v. GEORGE L. PUTNAM, Appellant.

(Supreme Court, Appellate Term, May, 1901.)

Partnership — When one partner may sue another at law — Contract — Mutuality — Offer and acceptance.

One partner may sue another at law where the cause of action does not require an accounting of their joint transactions.

A contract which has not the element of mutuality is void.

An offer may be withdrawn at any time before the other party has acted upon it.

APPEAL from a judgment, rendered by the Municipal Court of the city of New York, tenth district, borough of Manhattan,

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in an action tried without a jury. Action to recover moneys paid, laid out and expended upon the defendant's alleged promise to refund. The answer was a general denial.

Le Roy D. Ball, for appellant.

A. G. N. Vermilya, for respondent.

BISCHOFF, P. J. The parties, as joint owners in unequal proportion of certain patents for an improvement in firearms, letters for which had issued to them in foreign countries, had associated themselves under written articles for the purposes of exploitation of their invention. Certain charges for the year 1900 were required to be paid to preserve their rights as patentees, and these, with the expense incidental to remittance, were borne by the plaintiff. Thereafter this action was brought to recover from the defendant his proportion of such charges and expenses, the plaintiff alleging that the payment was made in reliance upon the defendant's express promise to refund the amount in proportion to his ownership of the patents.

Counsel for the appellant contends, and counsel for the respondent concedes, that, under the written articles hereinbefore alluded to, the parties were copartners. However, notwithstanding this fact, the action was, nevertheless, maintainable, since no accounting of their joint transactions was involved (Ferguson v. Baker, 116 N. Y. 257; Bank of British North America v. Delafield, 126 id. 410); but plaintiff clearly failed in his proof and the evidence in no aspect justifies the judgment recovered.

The defendant's alleged promise was made in August, 1899, and the payment of the charges imposed upon the patents was not made by the plaintiff until some time after May 21, 1900. Between these dates correspondence ensued between the parties, which took its initiative from the plaintiff's demand of the defendant that the latter remit his proportion of the accruing charges, a demand with which the defendant pertinaciously refused to comply, except that he intimated his consent to such payment out of a balance of money claimed by him to be unexpended and in the plaintiff's hands; and the correspondence culminated in the plaintiff's letter to the defendant's attorney, under date of June 12, 1900, from which we quote as follows: "I have now given you ample notice and opportunity to act in the matter

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of payment of taxes due the 25th inst., *and a further neglect* on your client's part to furnish in cash, his proportion of the gross amount then payable, *will be considered by me as a refusal on his part to do so.*" That the defendant's attitude was a pronounced repudiation of the promise claimed to have been made by him, and that the plaintiff did not, therefore, make the asserted payment with reliance upon any such promise, seems irrefragable from the circumstances detailed.

But, counsel asserts, that the plaintiff made the payment in performance of a contract, made in August, 1899, so to do, from which neither party was at liberty to recede. What contract? We have scrutinized the record in a vain effort to find evidence sufficient to support the contention that there was one. The plaintiff's personal attitude upon the trial was consistent only with a promise on his part to meet the defendant's proportion of the patent charges out of money to be previously remitted by the latter. Nowhere does it appear that the plaintiff engaged to pay such charges in consideration of the defendant's promise to refund his proportion of the amount after it had been paid, an engagement which might have entailed liability in damages for a breach of its performance. The plaintiff's attitude, as has already been said, was a clear and unmistakable disclaimer of any such engagement upon his part. Where, then, was the mutuality, the constituent of every contract? 5 Lawson Rights, Rem. & Pr., § 2243, p. 3758. Clearly, from the proof, there was no more than the defendant's offer to refund his proportion of the necessary charges if the plaintiff should meet them. Until acted upon by the plaintiff, he was permitted to withdraw (L'Amoreux v. Gould, 7 N. Y. 349; Willetts v. Sun Mut. Ins. Co., 45 id. 45), and that he did withdraw the offer, if it was ever made, before any of the charges upon the patents were met by the plaintiff, is apparent from his repudiation of it in the course of the correspondence already alluded to. Certain it is that the defendant's attitude therein was not such as to persuade the plaintiff to believe that he intended to fulfill any such promise.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

LEVENTRITT and CLARKE, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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MAURICE S. KELLER, Respondent, *v.* JOSEPH STRAUSS, Appellant.

(Supreme Court, Appellate Term, May, 1901.)

Sale — The vendee must establish affirmatively a right to rescind — Charge as to burden of proof.

Where an action for goods sold is defended by the vendee upon the ground that the vendor gave him a privilege to return such of the goods as he had failed to sell and that to that extent he had a right to rescind, he must prove such right by a preponderance of evidence, and hence a charge of the trial court that the defendant had the "burden of proof" upon the question of rescission is not harmful nor calculated to mislead the jury.

APPEAL from a judgment of the Municipal Court of the city of New York, fifth district, borough of Manhattan, rendered upon a verdict for the plaintiff. Action to recover the agreed price of goods sold and delivered, the defense being that, according to the terms of purchase, the defendant was privileged to return such of the goods as were not resold by him, and to that extent to rescind his purchase. The jury found for the plaintiff in the amount sued for.

House, Grossman & Vorhaus, for appellant.

Abraham A. Joseph, for respondent.

BISCHOFF, P. J. To the trial justice's charge that the defendant had the burden of proof respecting his claim of a right to rescind his purchase to the extent of the goods returned, the defendant excepted. No other error is claimed on this appeal.

We accede to the contention of the appellant's counsel that the transaction between the parties was erroneously alluded to upon the trial as a "conditional sale." It appeared from the testimony of both parties, beyond dispute, that title to the goods passed to the defendant unconditionally, the latter's only contention being that, at the time of his purchase, it was agreed that he could return such of the goods as had failed of a resale by him.

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But, obviously, counsel does not differentiate between the burden of proof and the preponderance of the evidence. Underh. Ev., § 247. The fixing of the burden of proof was with the justice as matter of law, and as a preliminary to the introduction of evidence. The record does not disclose that any question arose with regard to it while the trial was in progress. Quite to the contrary, the defendant appears to have assumed the burden of proving the right to rescind, and that there was evidence in support of the defense is inferable from the fact that the case was submitted to the jury upon that point. The instruction excepted to was, therefore, wholly innocuous, and no prejudice to the defendant could have resulted therefrom. Moreover, it was consistent with the defendant's attitude upon the trial.

Again, the charge considered as the embodiment of a proposition of law was not inaccurate. It may not have been needful, or even appropriate, but, *non constat*, that it was error. Upon proof of the delivery of the goods to the defendant under the latter's agreement to purchase, without more, the plaintiff was entitled to the direction of a verdict in his favor. It was not incumbent upon him to prove a negative, the absence of a right upon the defendant's part to rescind, wholly or in part. In so far, therefore, as the defense was founded upon the claim of such a right, it involved the affirmation of new matter, which, if not proved, was inevitably unavailing. 5 Am. & Eng. Ency. of Law (2d ed.), 24.

And, if we assume that the trial justice meant that it was incumbent upon the defendant to establish the fact of an agreement conferring the right to rescind, by a preponderance of the evidence, and that the jury so understood it, the charge was none the less correct. Having the affirmative of the particular issue, the defendant must needs have failed had the evidence respecting it been found to be in even balance. The defense, in that event, would not have been maintained.

The judgment should be affirmed, with costs.

LEVENTRITT and CLARKE, JJ., concur.

Judgment affirmed, with costs.

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ANNIE B. WRIGHT et al., Respondents, v. MILTON SCHNAIER, Appellant.

(Supreme Court, Appellate Term, May, 1901.)

Evidence — Harmless error — Competency of experts.

Error, in admitting harmless parol evidence in regard to a written contract, is not a ground for reversal.

The testimony of other persons, in regard to the competency of an expert, is admissible, and the court is not confined in determining competency to the expert's own testimony.

APPEAL from a judgment for the plaintiffs, rendered by the Municipal Court of the city of New York, tenth district, borough of Manhattan, upon a verdict in their favor. Action to recover upon three causes of action, one for a balance alleged to be due under a contract for work, labor and services, and materials furnished, the second and third for loss of profits which would have accrued from two several contracts but for the defendant's alleged prevention of performance. The defendant denied that there remained anything due under the first cause of action, and that he prevented performance of the contracts set forth in the second and third causes of action. The answer, furthermore, sought recovery upon three several counterclaims growing out of the plaintiffs' alleged breach of the contracts mentioned.

Milton Mayer, for appellant.

Hiram M. Kirk, for respondents.

BISCHOFF, P. J. Under objection by the defendant's counsel, the trial court admitted testimony which tended to show that the plaintiffs were induced to enter into a contract for the supply of certain marble work, at the price therein named, by the defendant's representation that an offer to do the work for less than the amount of the plaintiffs' previous offer had been made to him. The contract was in writing, and, conceding the technical incompetency of the evidence, it does not appear that prejudice to the defendant resulted from its admission. It did not in any manner tend to vary or contradict the terms of the contract, or

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bear upon the issue. Harmless error affords no ground for reversal. De Graaf v. Wyckoff, 118 N. Y. 1, 5; 3 Silv. Ct. App. 507, and cases in note.

Under like objection testimony was elicited, upon the cross-examination of an expert called for the defendant, which tended to establish the competency of a witness called as an expert in the plaintiffs' behalf. This was not error. In determining the question of the competency of a witness called to give expert testimony, the court is not, as appellant's counsel insists, confined to the statements of such witness. The testimony of other witnesses touching his competency is admissible. Lawson Exp. Test., 236; Rogers Exp. Test., § 17; Underh. Ev., p. 272, § 188, note 2.

The contract for the supply of the marble work, the defendant's prevention of performance of which was in issue under the plaintiffs' third cause of action, was silent as to the time for its performance, and when the parties had concluded the introduction of evidence it appeared by the testimony of the plaintiffs' witness, Robinson, and the admission of the defendant, that the performance was to be begun upon notice by the defendant. It furthermore appeared from Robinson's testimony that no such notice was given, and it was conceded that the defendant procured the work to be done by persons other than the plaintiffs. True, the defendant testified that the plaintiffs, by their representative, Robinson, had intimated their unwillingness to proceed with the work, owing to a dispute growing out of another transaction, but this state of the evidence, coupled with the fact that the defendant's testimony was that of an interested witness, presented a sufficient conflict to require submission to the jury of the question as to which of the parties was in fault for non-performance. Hence there was no error in the trial court's refusal to dismiss the complaint as to the cause of action last referred to.

No other errors are claimed upon this appeal, and the judgment should, therefore, be affirmed, with costs.

LEVENTRITT and CLARKE, JJ., concur.

Judgment affirmed, with costs.

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DAVE SHAPIRO, Respondent, *v.* JACOB LANKAY and ISAAC COHEN, Appellants.

(Supreme Court, Appellate Term, May, 1901.)

Replevin — Failure to prove title — Judgment in, not supportable as one for a conversion.

The plaintiff cannot succeed in replevin unless he proves title to the specific property which he seeks to recover, and where he fails in this respect he cannot maintain his action by proving a claim for the value of the property, as such claim is in distinct repudiation of any continued claim to the property itself.

A judgment must be *secundum allegata et probata* and hence a judgment in replevin for the plaintiff cannot, by any tacit consent of the defendants, be supported as one for a conversion.

APPEAL from a judgment of the Municipal Court of the city of New York, second district, borough of Manhattan, in an action tried by the court without a jury. Action to recover specific personal property, the defense being a general denial.

Charles C. Levenson, for appellants.

Meyer Greenberg, for respondent.

BISCHOFF, P. J. The action was to recover specific personal property, a quantity of merchandise, possession of which was delivered to the defendants by Samuel Bernstein, Charles Bernstein and Isadore Bernstein, composing the firm of Gotham Novelty Company, the former owners and the plaintiff's alleged assignors. The court below gave judgment for the plaintiff for the return of the property, or its value if such return could not be had. In this view of the case, however, the recovery is exposed to successful challenge for failure of proof of the plaintiff's title to the property in suit.

Concededly, the Messrs. Bernstein were the owners of the property, and the plaintiff's claim of right to its recovery was predicated wholly of an alleged transfer thereof by such owners to him. A paper was offered and received in evidence, against the defendants' objection, which purported to "sell, assign, transfer and set over" to the plaintiff all the "right, title and inter-

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est" of the Messrs. Bernstein "In and to a certain claim which they had against Jacob Lankay and Isaac L. Cohen, doing business under the firm name or style of J. Lankay and Company, of the City, County and State of New York, amounting to the sum of $144.79." That the claim alluded to in this paper had reference to the property in suit was left to the veriest conjecture. If, however, we regard the claim as one arising upon a sale or from the conversion of the property in suit, then, self-evidently, the plaintiff did not derive title to the property by means of the paper, since the assertion of a claim for the value of the property is in distinct repudiation of any continued claim to the property itself. No other evidence in attempted support of the plaintiff's claim of title was adduced.

If it is urged upon the record that the defendants had tacitly consented to the litigation of an issue other than that made by the pleadings (Frear v. Sweet, 118 N. Y. 454), to wit, conversion, and that, in that aspect, the paper alluded to was a sufficient investiture of the right to recover, it should be observed that the judgment is not *secundum allegata et probata* (Day v. New Lots, 107 N. Y. 148; Romeyn v. Sickles, 1 Silv. Ct. App. 594), it being consistent only with the former issue.

Judgment reversed and new trial ordered, with costs to the appellants to abide the event.

LEVENTRITT and CLARKE, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

HARRY HOFFMAN, Respondent, *v.* THE NORTH BRITISH AND MERCANTILE INSURANCE CO. OF EDINBURGH AND LONDON, Appellant.

(Supreme Court, Appellate Term, May, 1901.)

Fire insurance — Temporary agreement to reinsure risks — Failure of consideration as affecting the insured — Privity.

A temporary agreement, to be replaced by a final one "of like terms and conditions" when the balance of the consideration shall be determined and paid and to be void unless it is paid, by the terms of which the risks of one fire insurance company are assumed by an-

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other, makes the latter at most a reinsurer; and, therefore, where the consideration as determined is not paid in time by the company discontinuing business, and the temporary agreement is therefore declared abandoned by the reinsurer, and the final one is never executed, neither a policyholder of the discontinuing company, nor his assignee, can recover of the reinsurer a loss which occurred before the reinsurer abandoned, as there is no privity of contract between it and him under the temporary agreement and the consideration for the final agreement has failed.

APPEAL from a judgment of the Municipal Court, first district, borough of Manhattan, in favor of plaintiff and against the defendant. Action by the plaintiff as assignee of one Morris Resler to recover of the defendant $204.93, the proportionate amount of loss and damage to Resler's stock of goods caused by a fire which occurred on July 28, 1900. The plaintiff seeks to recover on the ground that, under the contract stated in the opinion, the defendant assumed a direct liability to the insured.

Bowers & Sands, for appellant.

Leo Levy, for respondent.

CLARKE, J. On the 24th of April, 1900, plaintiff's assignor took out a policy of insurance against fire in the Traders Insurance Company of New York in the sum of $1,000 on his stock of goods, and paid therefor a premium of $20.

On the 27th of April, 1900, the Traders Insurance Company and the North British & Mercantile Insurance Company of Edinburgh and London made an agreement in writing whereby, upon the payment of $10,000, before twelve o'clock, noon, on April twenty-eighth, the latter company — the defendant — agreed "to assume the fire risks of the Traders Fire Insurance Company of New York from six o'clock P. M. April 27, 1900, not otherwise reinsured, a further payment on account of $25,000 to be paid on or before May 1st and the balance due, namely, the net unearned premiums on outstanding policies less 15 per cent commission thereon to be paid upon completion of schedules and at least within thirty days from date thereof — This contract to be

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null and void unless payments as above stated are duly made. This temporary agreement to be replaced by a final contract of like terms and conditions when the total amount due thereunder is determined as per schedule."

It is quite evident from this contract, and from the proceedings ensuing thereon and thereunder, that the transaction between the two companies was intended to be of the same character as that described in Fischer v. Hope Mutual Life Ins. Co., 69 N. Y. 161: "One life insurance company was about to discontinue its business, and cease to carry out its contracts with its policyholders. Another life insurance company, in consideration of a transfer to it of nearly all the assets of the former, was about to agree to take upon itself the liability of the former to its policyholders." If the "final contract of like terms and conditions" alluded to in the agreement of April twenty-seventh had been executed and the consideration paid, there can be no doubt but that the facts would have been on all fours with those set forth in Glen v. Hope Mutual Life Ins. Co., 56 N. Y. 379, and the doctrine of that case — "it is the settled law that the plaintiffs (policy holders) might maintain this action against the defendant on the policies which by the agreement it had assumed" — would govern. But the difficulty is that the final contract never was entered into between the two insurance companies. After several extensions by mutual consent, the Traders Company, not having paid the sums due at the day finally fixed, defendant wrote to it, August third: "You will please take notice that you have made default in the contract entered into by and between your company and the North British & Mercantile Company of London and Edinburgh bearing date the 27th of April, 1900, we hereby declare said contract to be null and void." The said payments were conditions precedent. The said contract on its face stated it was a "temporary agreement." It expressly provided: "This contract to be null and void unless payments as above stated are duly made." The consideration for the permanent contract having failed, it was not made, and the temporary agreement or option became and was declared to be null and void. Under such circumstances, during the period in which the temporary arrangement was in force, the defendant company was at best a reinsurer of the policies of the Traders Company, and as there was no privity of contract with plaintiff's assignor, he has no cause of action.

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In the Glen case, the contract had been executed and completed, and it provided in terms that the company taking over the business "hereby agrees to assume all such policies and *to pay the holders thereof* all such sums as the party of the second part may by force of such policies become liable to pay." Under the facts in this case, no such final contract was ever made, though in contemplation, by reason of the failure of consideration. Said the Court of Appeals in Dunning v. Leavitt, 85 N. Y. 30: "But I know of no authority to support the proposition that a person not a party to the promise, but for whose benefit the promise is made, can maintain an action to enforce the promise, where the promise is void as between the promisor and promisee, for fraud, or want of consideration, or failure of consideration."

Judgment reversed and new trial ordered, with costs to appellant to abide the event.

BISCHOFF, P. J., and LEVENTRITT, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

KALMAN SCHECHTER et al., Appellants, *v.* WALTER S. WATSON, Respondent.

(Supreme Court, Appellate Term, May, 1901.)

Conversion — Demand, when unnecessary.

Where the owner of a building orders materials, which have been sold and delivered by third parties to his builder upon an antecedent condition of payment which the builder has not performed, to be affixed to the building and pays for the work, he has exercised an act of dominion over materials not lawfully in his possession which makes him liable in conversion to the owners of the materials without demand upon their part.

APPEAL from a judgment of the Municipal Court of the city of New York, fourth district, borough of Manhattan, in favor of the defendant and against the plaintiffs, dismissing the complaint, with costs. Action for conversion.

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J. A. Seidman, for appellants.

Meyer & Josephson, for respondent.

CLARKE, J. This is an action to recover for the conversion of sixty-four mantels of the value of $223. The learned justice held, in dismissing the complaint: "The complaint is dismissed for insufficiency of proof, and for the reason that the testimony of plaintiffs is so varying and contradictory that the court is unwilling to issue a body execution upon it. Furthermore Margolies nor plaintiffs was the owner and there was no proof of demand to return the property." As there was no contradiction of the evidence of plaintiffs and their witnesses, and said witnesses were not impeached, it was error to deny its conclusiveness. Hull v. Littauer, 162 N. Y. 569.

The defendant, having exercised an act of ownership, by causing the mantels to be affixed to the building, no demand for their return was necessary, the sole object of a demand being to turn an otherwise lawful possession into an unlawful one by reason of a refusal to comply with it, and thus to supply evidence of a conversion. After a wrongful taking and carrying away of the property, the cause of action has become complete without further act on the plaintiffs' part. Pease v. Smith, 61 N. Y. 477. In the case at bar, defendant never came into lawful possession of the property. It was taken to the building to deliver to the builder Margolies on payment. Plaintiffs waited two days to make that delivery and collection. On Sunday defendant ordered the articles set in the building, and paid for that work done on that day — the conversion was completed and no demand was necessary.

Judgment reversed and new trial ordered, costs to abide event.

BISCHOFF, P. J., and LEVENTRITT, J., concur.

Judgment reversed and new trial ordered, costs to abide event.

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ROSA SCHREIBER, Landlord-Appellant, *v.* RACHEL GOLDSMITH et al., Tenants-Respondents.

(Supreme Court, Appellate Term, May, 1901.)

Summary proceedings — An agreement not creating the relation of landlord and tenant.

The owner of premises can maintain summary proceedings to dispossess only in a case where the conventional relation of landlord and tenant exists between the parties, and that relation is not created by an arrangement under which the occupants are permitted to make the premises their home provided they board the owner and make necessary repairs.

APPEAL from final order, made by the justice of the Municipal Court of the city of New York, for the seventh district, for dismissal of summary proceedings brought to remove the respondents upon the ground of their holding over after the expiration of the term of their tenancy.

Otto Horwitz, for appellant.

Epstein Brothers, for respondents.

Per Curiam. It would appear that the actual ground of the dismissal was the assumed inability of the justice to determine the rights of the parties without arrogating to himself equitable powers for the purpose of giving effect to a deed made by the appellant to her daughter, the respondent, Rachel Goldsmith.

This deed purported to convey the premises in question, subject to a life estate in the grantor, but, as we view the case, the conveyance was not material to the issue presented to the justice for determination.

The proceeding, if maintainable, was necessarily based upon the existence of the conventional relation of landlord and tenant. If the relation did exist, the respondents could not dispute their landlord's title, and the deed referred to certainly did not negative the appellant's power to receive the respondents, as tenants,

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during her lifetime, under an agreement made with a view to their becoming such.

Upon the evidence, however, we must hold that the dismissal was proper, there being no sufficient proof that the relation of landlord and tenant existed, and the accuracy of the reasoning which led to the correct result is not a substantial question upon this appeal. According to the testimony of the appellant, the arrangement between the parties was that the respondents (her daughter and the latter's husband) should make the premises their home and should take it upon themselves to board her (appellant) and make necessary repairs, this to continue during her pleasure. The respondents' evidence was to the effect that no such agreement was ever made, that they never agreed to board the appellant, and that they had taken up their abode in the house pursuant to the appellant's assurance that it should always be their home while they lived.

Taking the appellant's evidence as proof of the facts, no case of tenancy was made out. In Matter of Matthews v. Matthews, 49 Hun, 346, the nature of such an arrangement as this was considered, and it was held that the promise to board the owner (a relative) was not an agreement to pay rent, or to make return for use and occupation as upon a leasing, within the reasonable intention of the parties. The further point in that case, touching the promise of a conveyance or devise as additional consideration, does not afford a ground of distinction. It is quite apparent from the reasoning employed in the opinion that the nature of the occupancy and of the duties assumed by the alleged tenants afforded the main ground for the conclusion that there was no intention to create the relation of landlord and tenant.

The final order must be affirmed, with costs.

Present: Bischoff, P. J., Leventritt and Clarke, JJ.

Final order affirmed, with costs.

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JULIA A. SHAW, Plaintiff, *v.* THE MANHATTAN AVENUE RAILWAY Co. et al., Defendants.

(Supreme Court, New York Special Term, May, 1901.)

Elevated railroads — Consent of abutting owner as an estoppel — Damages where only a distinct part of a hotel fronted on the street where the railroad ran.

An abutting owner who consents to the construction of an elevated railroad in the street in front of his premises cannot subsequently recover of it damages for its operation.

Where a hotel owned and operated under a single management consists in part of a distinct building, fronting on a street in which an elevated railroad is operated, conveyed separately, and having its original walls standing but perforated to give access to other parts of the hotel, damages may properly be awarded the distinct building for the injury to its easements which resulted from the operation of the railroad in front of it, but none can be awarded for that remaining part of the hotel, which did not front on the street where the railroad ran.

ACTION for fee and rental damages.

M. S. & L. S. Isaacs (Wm. G. Peckham, of counsel), for plaintiff.

Charles A. Gardiner, for defendants.

FITZGERALD, J. The complaint herein sets forth one cause of action. By stipulation, it was agreed to divide the action; the first cause of action under the stipulation is for damages to the property on the south side of Forty-second street, commencing at a point sixty-four feet one inch east of Fourth avenue, and running easterly sixty-six feet; the second cause of action is for damages to the remaining portion of property described in the complaint. It was admitted on the trial that, in 1875, James E. Shaw was the owner of the property described in the first cause of action. In October, 1875, said Shaw signed a paper, of which the following is a copy:

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"We the undersigned owners of land bounded on Forty-second Street (south side) between Lexington and Fourth Avenues hereby respectively consent to the construction and operation of an elevated railway over, through and along said street. The said railway to be constructed and operated by either the New York Elevated Railway Company or the company to be organized under Chapter 604 of the Laws of 1875.

"Dated, New York, October, 1875.

"Block number, 335; ward number, 67, 68, 68½; foot front, 25, 20, 21; valuation, $200,000.

"I am in favor of an Elevated Road over the middle of the street but not on the walk.

"JAMES E. SHAW."

The question of the consent of the owners of abutting property was passed upon by the Court of Appeals in Heinberg v. Man. R. Co., 162 N. Y.; it was held, O'Brien, J., writing the opinion (p. 354): "If this paper is to be given the legal effect which it was intended to have, then it is very plain that the defendants have done nothing that the plaintiff did not consent to, and, hence, it cannot be said that there was any illegal invasion of the plaintiff's property rights. * * * If the plaintiff did consent, then he has no cause of action either at law or in equity. The plaintiff had no title to any part of the street in front of his property. He was a mere abutter, and his written consent that the railway might be constructed and operated in front of his property is a complete answer to a suit in equity in his behalf or in behalf of his grantee to restrain the operation of the road, and so this court has held even where the party bringing the suit owned the fee of the street when the consent was given. (Herzog v. N. Y. E. R. R. Co., 76 Hun, 486; affd., 151 N. Y. 665, on opinion below; White v. M. R. Co., 139 N. Y. 19.)" Upon the authority of this case, I must hold that the plaintiff herein is precluded from a recovery as to the property covered by the consent, and the first cause of action is, therefore, dismissed, with costs. The second cause of action is for damages to the remaining portion of the property on which the Grand Union Hotel stands, and this comprises the land on Forty-first street, the Fourth avenue front, and a frontage on Forty-second street of sixty-four feet. Included in the second cause of action is the property known as the Westchester Hotel, which was conveyed

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to the plaintiff by John Garvey and wife by deed dated and recorded July 1, 1880; this property consists of three lots with a building thereon, and has a frontage of sixty-four feet on Forty-second street and seventy-five feet three inches on Fourth avenue.

Mr. Simeon Ford, a son-in-law of the plaintiff, and a member of the firm of Ford & Shaw (which consists of Simeon Ford, Samuel T. Shaw and Mrs. Julia A. Shaw), who conduct the Grand Union Hotel, testified in reference to the Westchester Hotel property as follows: "Q. Do you consider the hotel divided into two parts, one on the corner of Fourth Avenue and 42nd Street, about sixty-four feet on 42nd Street by half the block on Fourth Avenue; and the other part the rest of the edifice? A. The corner of 42nd Street and Park Avenue running some seventy-five feet on Park Avenue and sixty-three or sixty-four on 42nd Street, is a distinct building put up separate from the rest, with original walls standing, perforated to give access to such other portions of the hotel." This being a separate and distinct building, the remaining portion of the property embraced in the second cause of action must be eliminated from consideration under the principle stated in Keene v. Metropolitan Elevated R. Co., 79 Hun, 452: "In the award made in this action damages were allowed for alleged injuries to the apartments which had no frontage on Ninth avenue as well as to the two which had such frontage, and the question presented upon this appeal is whether such an allowance can be justified. It seems to us that it cannot. The three apartments which fronted on Fifty-seventh street had no easements of light, air and access upon Ninth avenue. While damages have been allowed where premises are so situated that they are to be considered as a single parcel, although the total frontage might not be upon the street occupied by the elevated railway, yet where such premises are improved by buildings distinct within themselves, some of them having no frontage upon the avenue occupied by the railroad, it is difficult to see upon what theory an award for the destruction of easements upon the avenue upon which such buildings have no frontage can be predicated. * * * It has been urged that because of the fact of there being unity of construction in the building and unity of ownership a different rule should obtain. But it is apparent that notwithstanding the unity of construction and unity of ownership these premises are occupied as distinct and separate buildings,

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just as much as though there was no architectural unity and there was a division of ownership. It is difficult to see how mere architectural unity or single ownership can give an easement upon a street where none would exist even if the occupation was the same and the interior arrangements were the same but the exterior appearance showed diversity."

I find that the plaintiff is entitled to $25,000 for damages to the fee of the property hereinbefore described as the Westchester Hotel, and $1,500 per year for rental damage.

Ordered accordingly.

WINFIELD S. PROSKEY, Plaintiff, *v.* THE CUMBERLAND REALTY CO., Defendant.

(Supreme Court, New York Special Term, May, 1901.)

Injunction — Purchaser of an apartment house enjoined from interfering with a tenant whose lease had not expired.

A tenant in lawful possession of an apartment for a term unexpired, entitled at all reasonable hours to the rights of ingress and egress, to gas and water supply and to elevator service, may enjoin a purchaser of the apartment house who bought with notice of the tenant's rights and recognition of them, from interfering with any of them in the process of tearing down the building; and the fact that the purchaser intends to erect a new and expensive building and will lose largely if the tenant occupies until the end of his term, is not a sufficient reason for remitting the tenant to his action at law for damages.

MOTION for an injunction *pendente lite.*

Frost & Johnson (Roger Foster, of counsel), for plaintiff.

Strong & Caldwalader, for defendant.

FREEDMAN, J. This is a motion for an injunction *pendente lite,* to restrain the defendant herein from destroying, tearing down or removing the building known as the "Cumberland," an apartment-house, and tearing down, destroying or removing the

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stairways and necessary means of ingress thereto and egress therefrom, and from undermining the foundations, walls or supports of said building and doing such other acts as will render the building unsafe or uninhabitable.

The premises are located at the intersection of Twenty-second street, Broadway and Fifth avenue in this city, and the plaintiff herein leased, on September 29, 1900, an apartment therein known as No. 21, consisting of two rooms situated on the sixth floor on the east side of the building, for the term of one year.

The defendant herein acquired the ownership of the premises bounded by Broadway, Twenty-second street and Fifth avenue about April 30, 1901, which plot includes the Cumberland, and proposes to erect thereon a modern fireproof structure.

Under his lease, the plaintiff had a right of ingress to and egress from his rooms at all reasonable hours, the use of the fixtures in such apartment, the water supply and the elevator service.

These rights were admitted and observed by the former owner, and were recognized and a promise made to respect them by the defendant, as appears from the contents of two letters written to the plaintiff under dates of March 4 and March 11, 1901, respectively, by one C. E. Harrell, whose authority to write such letters for and on behalf of the defendant is not disputed, and who states, among other things, that "if anyone wishes to remain in the building after that period (May 1st, 1901) the elevator will be kept running and all the conditions of the leases legally complied with."

No charge is made that the plaintiff has not strictly complied with the terms and conditions of the lease upon his part. Notwithstanding these facts, the defendant has, in the progress of its work upon its premises, began the tearing down of this apartment-house, has already torn down the stairway leading from the first to the second story, refuses to continue the elevator service and has, in other particulars, interfered and threatens to continue to interfere with the rights granted the plaintiff under and by virtue of his lease, its principal excuse being that it is engaged in an enterprise that will involve over $2,000,000; that any delay in the prosecution of the work in the tearing down of the buildings upon the premises and the erection of new buildings thereon will result in a large pecuniary loss;

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that the balance of disadvantage to the plaintiff from his having "to move out of his apartment five months before the expiration of his lease is comparatively insignificant, and that the defendant stands ready to amply compensate him for such disadvantage."

It does not appear, in fact the contrary appears, that the work of demolition has so far progressed as to render an injunction futile. The defendant purchased the property in question at private sale, and with full knowledge of existing conditions and subject to the rights of persons in possession. It is engaged in the prosecution of a private enterprise for private profit. It contends that the plaintiff has an adequate remedy at law in an action for damages; that an injunction should not be granted unless irreparable damage is threatened, or that the defendant is shown to be irresponsible and that money is an adequate compensation. The decisions cited by the defendant do not, however, uphold its contention. Under the facts and circumstances as disclosed by the affidavits submitted on this motion, I am not prepared to admit that the damages that might be sustained by the plaintiff, should the methods taken by the defendant to evict him be successful, as they would be if continued, could be proven or recovered in a common-law action. Neither am I willing to subscribe to such methods or the practice sought to be established by the conduct of the defendant herein. I much prefer the doctrine enunciated by Mr. Justice Beekman in the case (not reported) of Boitel v. Morton, where he, under a somewhat similar state of facts, says, "that the latter (the defendant) is clearly within his right, both legal and equitable, in insisting upon retaining his tenancy during the continuance of his term, notwithstanding the exigencies which apparently make it so important to the defendant to obtain possession of the premises. To assume any other position in a case of this kind would be to subject every lessee to the will of an old or new owner who might desire, during the continuance of his lease, to destroy the leased building for the purpose of erecting a new one."

The injunction should be continued so far as to prohibit the defendant from interfering with the plaintiff in his rights of ingress and egress to and from his apartment, from discontinuing the elevator service for the use of the plaintiff at reasonable hours and times, from interfering with the gas or water-pipes if

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the effect thereof will be to deprive the plaintiff of his supply, and from tearing down or removing any portion of the said Cumberland building in any way that will materially interfere with the plaintiff's right to the enjoyment of his rooms therein, or that will render the same untenantable.

Ordered accordingly.

THE PEOPLE ex rel. SAMUEL JAFFE, Relator, v. HERMAN BOLTE, as Justice of the Municipal Court of the City of New York, Respondent.

(Supreme Court, New York Special Term, May, 1901.)

Municipal Court of the city of New York — Review of refusal to remove action to another district — Mandamus lies where justice refuses to receive motion papers.

An alleged wrongful refusal of a justice of the Municipal Court of the city of New York to order a removal of an action to another district of the court should be reviewed by appeal and a writ of mandamus will not lie against the justice.

Where, however, the justice refused to receive or file motion papers, for a rehearing of the motion for a removal, which the defendant deemed essential to a proper review of the adverse decision, the court ordered a peremptory writ to issue compelling the justice to file the papers to the end that they might be made a part of the record.

APPLICATION for a writ of peremptory mandamus.

Benjamin & Losee, for relator.

Elias Rosenthal, for respondent.

FREEDMAN, J. This is an application for a writ of peremptory mandamus, requiring the above-named defendant to file with the clerk of the Second District Municipal Court of this city certain motion papers submitted to him on April 30, 1901, upon a hearing of a motion for a rehearing of an application made by the defendant in an action then pending in said Municipal Court, entitled Philip Stromberg v. Samuel Jaffe, said application hav-

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ing been made for a transfer of said action from said Second District Court to the Ninth District Court, and in case the material facts set forth in the moving papers are put in issue, then that an alternative writ issue.

The facts shown upon the papers read upon this motion, so far as the same are material to this application, are substantially as follows: An action was begun in the Second District Municipal Court by Philip Stromberg against Samuel Jaffe, the return day in said action being April 17, 1901. The defendant in that action, on the return day, made a motion for a transfer of the action to the Ninth District Municipal Court, and in support of said motion presented to the justice an affidavit made by the defendant, setting forth that neither the plaintiff nor the defendant resided in said second district, but that the defendant resided in the ninth district. The plaintiff's attorney thereupon asked for and obtained permission to file an affidavit in reply, showing that the plaintiff resided in said second district. Such affidavit was filed on April 19, 1901. The action was adjourned until April 24, 1901. On that day the parties appeared, and the plaintiff asked for a further adjournment, whereupon the defendant's attorney stated to the court that he desired to renew his application for a transfer of the action. The justice thereupon directed the plaintiff (Stromberg) to take the witness stand and he, after being sworn, testified that he resided in the second district, at No. 148 Bowery. Stromberg was cross-examined by the plaintiff's attorney at some length, and, as appears from the stenographer's minutes submitted on this motion, swore that he resided within the second district, and that he had no other residence except at No. 148 Bowery. The case was then again adjourned until May 2, 1901. Upon April twenty-seventh the defendant's counsel prepared and served papers, making a motion for a rehearing of his application for a removal of said action to the ninth district, which motion was returnable on April 30, 1901. Upon the return day of this last motion, and when the defendant's attorney attempted to be heard thereon, the plaintiff's attorney interposed a preliminary objection, stating that the court had heard the application on the return day of the summons, and again on April twenty-fourth, and had decided the same, and, therefore, had no further power in the premises. Thereupon, the justice stated that he had disposed of the mat-

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ter, and would not hear it again, and refused to accept the motion papers or to permit them to be filed; whereupon the defendant's attorney left them upon the desk of the judge.

The charter of Greater New York provides that an application for the transfer of an action in the Municipal Court must be made at the joinder of issue. It has been held in this court that the alleged wrongful refusal of a justice of the Municipal Court to order the removal of a cause is adequately remedied upon appeal, and that a writ of mandamus for that purpose will not lie. People ex rel. Goldstein v. Bolte, N. Y. L. J., Feb. 14, 1900; People ex rel. O'Brien v. Bolte, id., July 5, 1900.

I am constrained to follow those decisions until an appellate court shall have decided otherwise. If the decision of the issues of fact raised by the allegations of the opposing affidavit submitted to the justice on the part of the plaintiff, together with the testimony given by him upon the stand, and the dismissal of the defendant's motion for a rehearing of the motion for the transfer of the action was error, it would seem that the same could be reviewed upon an appeal taken from any judgment that might be rendered against the defendant in the action, and that such method would furnish an adequate remedy. For the refusal of the justice to either accept the motion papers or permit them to be filed in his court, and thereby become a part of the records of the case, a writ of mandamus should issue. The proper and orderly administration of justice requires that the rights of litigants should be jealously guarded and protected, and that papers submitted to the courts for the purpose of raising proper legal questions should be preserved, and especially so when the justice before whom the motion is made peremptorily dismisses the same without examination into the merits of the application set forth in the moving papers submitted to him. The relator herein may have an order granting a writ of peremptory mandamus to issue directed to the defendant, requiring him to file the papers presented to him on the motion made by the defendant in this action on April 30, 1901, so that the same shall be made a part of the record in said action of Stromberg v. Jaffe, but in all other respects this motion is denied.

Ordered accordingly.

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Matter of Opening TRINITY AVENUE from Westchester Avenue to One Hundred and Sixty-sixth Street.

(Supreme Court, New York Special Term, May, 1901.)

New York city — Commissioners of estimate — Awards.

Commissioners of estimate and assessment are not concluded as to the value of premises by the testimony of experts but may act on their own personal view of the premises.

Where a fee is taken by legislative authority the owner is entitled to a substantial award, even though other parties have easements in the land taken.

OBJECTIONS to the confirmation of the report of the commissioners of assessment.

The facts sufficiently appear in the opinion of the court.

John Whalen, Corporation Counsel (John P. Dunn, Assistant Corporation Counsel), for city of New York.

William McArthur, for motion.

Ernest Hall, for property-owners.

John C. Shaw, opposed.

Gumbleton & Hottenroth, for certain objectors.

LAWRENCE, J. The counsel to the corporation declines to move for the confirmation of the report of the commissioners in this proceeding and makes several objections to such confirmation. Objections are also presented on behalf of certain owners of property proposed to be assessed herein. The objections which are made by the counsel to the corporation are, first, that the awards made in connection with the parcels bounded by Trinity avenue and One Hundred and Fifty-sixth street, and One Hundred and Sixty-fifth and One Hundred and Sixty-sixth streets, show that an erroneous principle of valuation must have been adopted; secondly, that the awards made for the intended regu-

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lation of the block between One Hundred and Sixty-first street and One Hundred and Sixty-third street were without jurisdiction on the part of the commissioners. It is expressly stated in the brief filed by him that no objection is made merely upon the *quantum* of the awards. On the block bounded by Westchester avenue and One Hundred and Fifty-sixth street, Cauldwell avenue and Trinity avenue, the city objects to the award of $15,000 for parcel No. 1–D to the Lebanon Hospital Association of the city of New York. This award was made by the commissioners under the authority of section 978 of the Consolidation Act, continued by sections 979 and 980 of the Greater New York charter. Section 978 provides that "if the said commissioners of estimate and assessment shall judge that such intended regulation will injure any building or buildings not required to be taken for the purpose of opening, etc. * * * they shall proceed to make, together with the other estimates and assessments required by the first above mentioned act to be made by them, a just and equitable estimate and assessment of the loss and damage which will accrue by and in consequence of such intended regulation to the respective owners." It is conceded that these buildings formerly belonged to the Ursuline Convent, and were situated in the block of land bounded by Westchester avenue on the south, Cauldwell avenue on the west, One Hundred and Fifty-sixth street on the north and Trinity avenue on the east. The lands of the Ursuline Convent extended about midway between One Hundred and Fifty-sixth street and Westchester avenue. The convent buildings, now the hospital buildings, abutted on the south on Westchester avenue, faced on the front on Cauldwell avenue and the rear of the buildings faced Trinity avenue. Westchester avenue, Cauldwell avenue and One Hundred and Fifty-sixth street, bounding the block on which these buildings were situated, were laid out by the commissioners of Morrisania on a map filed by them in 1871, and the grades of those streets were laid down and established by said map. Trinity avenue south of One Hundred and Fifty-sixth street was not laid out at that time, on account, as it is alleged by the corporation counsel, of the difficulty of connecting it with Westchester avenue by suitable grades. The buildings on this property were erected prior to 1858, and were consequently upon the property when the maps establishing the present grades of One Hundred and Fifty-

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sixth street, Cauldwell avenue and Westchester avenue were filed. It appears from the testimony that Mr. Berry, the expert for the property-owners, testified to a damage to the building of $29,498.98, and that Mr. Tarbox, for the city, testified to a damage of $15,000. Upon referring to Mr. Tarbox's testimony it will be found that he stated that his testimony depended upon the fact that he knew that no damages had been awarded in regulating and grading Westchester avenue and Cauldwell avenue. He apparently assumed that because the owners of the property have not obtained damages in the two former proceedings they should obtain all their damages in this proceeding. This proposition is erroneous. It takes into consideration damages which are not confined to Trinity avenue, and which should have been included in other and independent proceedings. The expert for the owners of the property, however, testified that the damage to the buildings was, as above stated, $29,500. He did not base his estimate upon the failure of the commissioners in other proceedings to award damages for the laying out of other streets and avenues, or the acquisition of land therefor. The commissioners have adopted the lowest estimate of damage given by either of the experts. They are not bound by the testimony of either of those experts and may act on their own personal view, and I must assume, therefore, that the sum awarded is, in their opinion, a fair and just estimate of the damages which will be sustained by the owners of the hospital buildings. It is further objected by the corporation counsel that the property belonging to Clausen and others represented by Mr. Shaw has been awarded excessive amounts by the commissioners for the land taken for the opening of the avenue. There is no dispute that the legal title of the land for which the awards were made belongs to the parties to whom the commissioners have made the award, and there is no dispute either that, notwithstanding any easements which may have existed in those lands in favor of other parties, the owners of the fee are entitled to a substantial award. See Matter of Eleventh Ave., 81 N. Y. 436; Matter of Eleventh Ave., 49 How. Pr. 208; City of Buffalo v. Pratt, 131 N. Y. 293. After examining the testimony in this case, I am not prepared to say that these awards are excessive. Nor do I think that the commissioners have erred in the amount which they have allowed to Newbury D. Lawton, the owner of the property des-

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ignated as damage lot No. 31 in this proceeding. In the case of the City of Buffalo v. Pratt, 131 N. Y. 293, it was held that where a fee is taken by legislative authority the owner is entitled to substantial damages, notwithstanding there may be easements existing in favor of other parties in regard to such land. The objection made by the corporation counsel to the award allowed by the commissioners to the rector, churchwardens and vestrymen of the church of the Holy Faith, being damage parcel No. 32 on the damage map, I do not think can be sustained. It goes to the *quantum* of damage, and I am not satisfied that any erroneous principle is shown to have been adopted by the commissioners in making that award. My examination of the whole case satisfies me that no error in principle has been committed by the commissioners in making their report, and I, therefore, must overrule the objections made by the counsel for the city and by Messrs. Gumbleton & Hottenroth, the counsel for various objectors who have filed objections to the awards which have been made and the assessments which have been imposed. Draw order accordingly and settle on two days' notice.

Ordered accordingly.

Matter of Acquiring Title to Summit Avenue, from East One Hundred and Sixty-first Street to East One Hundred and Sixty-sixth Street, in the city of New York.

(Supreme Court, New York Special Term, May, 1901.)

New York city — Commissioners of estimate — Awards.

Where owners of land taken by a city litigate before a commissioner of estimate and assessment without objecting to him and he thereafter makes affidavit that he had disposed of any property owned by him within the area of assessment before the filing of the final report, an objection to his competency to act comes too late when taken on confirmation of the report.

An owner of land taken by a city under legislative authority is entitled to a substantial award although other parties have easements in the land.

An award is not substantial where the difference between the value given by the witnesses and the award indicates that the commission-

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ers must have mistakenly considered the land subject not only to private but also to public easements.

Where a city destroys buildings erected on land, with the consent of owners of private easements therein, once shown on a map as a street but which has ceased to be such because it was neither opened nor worked as such within six years from the filing of the map, the city must make the owner of the buildings a substantial award.

OBJECTIONS to the confirmation of the report of the commissioners of assessments.

The facts sufficiently appear in the opinion of the court.

John Whalen, Corporation Counsel (John P. Dunn, Assistant Corporation Counsel), for city of New York.

McCarty & Baldwin, and Robert J. Fox, for objectors.

LAWRENCE, J. In this case I am of the opinion: *First.* That the amounts awarded to the objectors, Weinstock and Purdy, for the parcels shown on the damage map as numbers 57 and 58 cannot be said to be so inadequate as to justify the court in interfering with the determination of the commissioners. The commissioners were not concluded by the opinion as to value given by the expert who was examined on behalf of the property-owners, and were entitled to act upon their own judgment as to that subject, as has been frequently held in proceedings of this nature. City of Syracuse v. Stacey, No. 1, 45 App. Div. 260, and cases cited. *Second.* The objection to the competency of Mr. Brown to act as one of the commissioners is not well taken, for the reason that the objectors appeared before the commissioners and litigated before them without objection, and also because the affidavit of said commissioner, read in reply to the affidavits in support of such objection, shows that he did not own any property within the area of assessment, and that the property referred to in the objector's affidavit, owned by him and his mother, was disposed of before the filing of the final report. Matter of Southern Boulevard, 3 Abb. (N. S.) 447; Matter of the Spuyten Duyvil Parkway, 67 How. Pr. 341; Matter of Application of Cooper, 93 N. Y. 507. *Third.* With regard to the objections urged by Mr. Fox on behalf of the Messrs. Devoe and Mrs. Ray-

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nor, I think that it is quite clear that there were private easements in the street shown upon the map of "High Bridgeville," which was filed in the office of the clerk of Westchester county. The street delineated upon that map never became a public highway or street, because, under the act of 1861, chapter 311, as it was not opened or worked within six years from the time of the filing of such map, it ceased to be a road or street for any purpose as regards the public. I do not think, however, that it can be successfully contended that there were not private easements in that property existing in those who had purchased from grantors, whose deeds referred to the map in question, and the Messrs. Devoe and Mrs. Raynor come within that class. It is well settled that the owner of land which is subject to easements vested in adjoining owners is entitled to substantial damages where the fee is sought to be acquired under legislative or municipal authority for the purposes of a public street. City of Buffalo v. Pratt, 131 N. Y. 293. The only question as to the awards in this case made to the Messrs. Devoe and Mrs. Raynor is as to whether they are nominal or substantial. The expert examined on behalf of the city testified in substance that if the street were not dedicated to public use he would estimate the value of the lots found within the limit of the avenue from One Hundred and Sixty-first to One Hundred and Sixty-fifth street at thirty-three and one-third cents per square foot. I understand it to be conceded that the allowance made by the commissioners to the Messrs. Devoe and to Mrs. Raynor is at the rate of five cents per square foot. The Messrs. Devoe owned 1,875 square feet, which, at thirty-three and one-third cents per square foot, would amount in value to $625. Mrs. Raynor owned 9,000 square feet, which, at thirty-three and one-third cents per square foot, would amount in value to $3,000, and the valuation placed upon her buildings by the expert for the property-owners was $1,180. These parties have been awarded by the commissioners as follows: Messrs. Devoe, $93.75; Mrs. Raynor, $435.35, and no award was made to Mrs. Raynor for the buildings. It seems to me that, under these circumstances, it is apparent that the commissioners have not made a substantial award to these parties. By this I do not mean that the rule that the commissioners are entitled to act largely upon their own judgment in fixing values should be disregarded; but the difference between the value given

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by the witnesses and the award for damages made by the commissioners is so great that I think the commissioners must have regarded the land taken as subject, not only to private, but to public, easements. Nor do I think that, as the land taken had never been worked as a public road or highway, it can be said that the buildings for which Mrs. Raynor asked compensation were illegally erected within the line of the proposed street. They were permitted by the owners of the private easements, for aught that appears to the contrary, to be built, and the city ought not to take and destroy them without making compensation for their value. The report of the commissioners should, therefore, be sent back for revision and correction in accordance with these views.

Ordered accordingly.

CHARLOTTE A. MOUNT, Trustee, Etc., under Will of RICHARD E. MOUNT, Deceased, Plaintiff, *v.* GERTRUDE M. MOUNT, Executrix, Etc., of HENRY R. MOUNT, Deceased, Defendant.

(Supreme Court, New York Special Term, May, 1901.)

Trustee's compulsory accounting — Statute of Limitations — Parties.

The Statute of Limitations does not begin to run against an action, brought by a substituted testamentary trustee against the representatives of a deceased trustee to compel an accounting and procure a recovery of the trust fund, until there has been a denial or repudiation of the trust.

Remaindermen are not necessary parties to such an action unless it requires the determination of their rights as between themselves or as between them and the trustee.

ACTION to recover the amount of a trust fund. The facts sufficiently appear in the opinion of the court.

C. S. Martin, for plaintiff.

Morris A. Tyng, for defendant.

LAWRENCE, J. The facts in this case are as follows: Richard E. Mount died on the 30th day of March, 1880, leaving a last

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will and testament, which was duly admitted to probate on May 5, 1880, by the surrogate of New York county. Said will, among other specific bequests, directed his executors to set aside out of his personal estate the sum of $5,000, and hold the same in trust for the benefit of his nephew, Richard H. Mount, during his life, and at his death to pay over and divide the same among his children in equal shares. The will appointed the brother of the testator, Henry R. Mount, and his nephew, Henry R. Mount, as executors. The brother, Henry R. Mount, died before the testator, and the nephew, Henry R. Mount, qualified as sole executor, and acted as such up to the time of his death, which occurred on the 29th of July, 1889. Henry R. Mount, the executor above named, left a last will, which was duly admitted to probate by the Probate Court of Orange, where said Henry R. Mount resided at the time of his death, and letters testamentary were issued to the defendant Gertrude M. Mount, as sole executrix thereof. After proceedings had before the surrogate of the county of Kings, New York, letters testamentary, ancillary to those already granted by the Probate Court of Orange, New Jersey, were granted to said Gertrude M. Mount, who duly qualified as such executrix. The plaintiff, Charlotte A. Mount, was, on the 27th day of August, 1900, duly appointed as substituted testamentary trustee in the place and stead of said Henry R. Mount, deceased, and she duly qualified as such substituted testamentary trustee and is acting as such. Plaintiff has demanded of the defendant the custody and control of the said trust fund and of the accrued interest thereon, and, the defendant having refused to pay over the same, this action is brought to recover the fund. The answer of the defendant sets up two affirmative defenses after putting in issue, either by positive denial or by denial of any knowledge or information sufficient to form a belief, the allegations of the complaint. Those affirmative defenses are, first, that the cause of action stated in the complaint did not accrue within six years before the commencement of the action, or within six years before the death of the defendant's testator, said Henry R. Mount, nor within ten years before the commencement of this action, and that there is a defect of parties in that Richard H. Mount, the beneficiary named in the trust alleged in the second paragraph of the complaint, has two children, both of whom, as defendant is informed

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and believes, are residents of the State of New York, and are not made parties defendant to this action. Upon the trial of the action, the plaintiff offered in evidence a paper produced from the files of the surrogate's office, purporting to be an inventory of the estate filed by Henry R. Mount, as executor of the decedent. The paper purported to be dated September, 1881, but was not filed in the office of the surrogate of the county of New York until the day of the trial of the action. Some time after the case had been submitted, a motion was made on the part of the defendant to strike out the paper offered in evidence on the trial, on the ground that the same was not filed in the office of the surrogate by the said Henry R. Mount, or by his authority or direction. This I refused to do, but reopened the case for the purpose of inquiring into the facts attendant upon such filing, and to enable the plaintiff to give other proof that the fund mentioned in the will of Richard E. Mount was received and set apart by the defendant's testator. In pursuance of this direction, the parties again appeared before the court and submitted further proofs. Under the explanation given by the plaintiff's attorney, upon that further hearing, as to their reasons for filing the inventory, I do not think that the defendant's counsel is justified in accusing them of bad faith. As to the affirmative defenses set up in the answer, it is sufficient to say that, as a general rule, the obligation of a trustee to account is not affected by the Statute of Limitations until a denial or repudiation of the trust. Zebley v. Farmers' Loan & Trust Co., 139 N. Y. 461. In this case, there was no denial or repudiation of the trust by Henry R. Mount, so far as the evidence discloses. He accepted the position of executor under his uncle's will and acted as such until the time of his death. As to the point that there is a defect of parties in that the remaindermen, the children of Richard H. Mount, are not joined as parties defendant, I understand it to be well settled that it is not necessary in an action brought by a trustee to recover trust property to make the *cestuis que trustent* parties to the action unless the action involves and requires the determination of rights as between the beneficiaries themselves, or as between them and the trustees. Such is not the case here. Matter of Straut, 126 N. Y. 201. Irrespective of the inventory, I think that the further evidence submitted on the second hearing is suffi-

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cient to warrant the court in holding that the said Henry R. Mount became possessed of the specific trust fund of $5,000 directed to be set apart by the will of Richard E. Mount for the benefit of his nephew, Richard H. Mount. The evidence given at the second hearing showed that Henry R. Mount, as executor, etc., of Richard E. Mount, deceased, had satisfied mortgages held by the testator or which belonged to his estate in an aggregate amount of over $50,000. This is sufficient, I think, to require the defendant to show what has become of that money. It must be assumed that, in satisfying the mortgages, the executor, Henry R. Mount, received either their face value or such amount as remained unpaid upon them. He is, therefore, shown *prima facie* to have been in possession of more than sufficient moneys to enable him to fulfill the direction of the testator to set apart the said sum of $5,000 and invest it in good security for the benefit of his nephew and his children as directed in the will. I am, therefore, of the opinion that the plaintiff is entitled to judgment for the amount of said principal of $5,000, or the security or securities representing the same, with interest from the date of the creation of the trust, besides the costs of this action. Draw decision and judgment accordingly, and settle on two days' notice.

Judgment for plaintiff, with costs.

Matter of Acquiring Title to Townsend Avenue, in the Twenty-fourth Ward, City of New York.

(Supreme Court, New York Special Term, May, 1901.)

New York city — Assessment for benefit — Inequitable rule of apportionment — L. 1897, ch. 378, § 980.

Condemnation proceedings taken by the city of New York, in which the preliminary report of the commissioners was filed after Jan. 1, 1898, are governed by the new charter (L. 1897, ch. 378), and consequently the commissioners may, under section 980 thereof, assess premises, along the line of the improvement, for benefit to the extent of one-half their value as valued by them and are not now limited, as formerly, to one-half the value as valued by the city tax commissioners.

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Where an inspection of the report of commissioners of assessment indicates that their rule of apportionment for benefit is irrational and inequitable, their report must be sent back for revision and correction.

OBJECTIONS to the confirmation of the report of the commissioners of assessment. The facts sufficiently appear in the opinion of the court.

John Whalen, Corporation Counsel (John P. Dunn, Assistant Corporation Counsel), for city of New York.

John C. Shaw, for Astor estate.

Gumbleton & Hottenroth, for objectors.

LAWRENCE, J. There are only two objectors to the confirmation of the report in this proceeding. Messrs. Gumbleton & Hottenroth, who appear for Morris B. Schurck, object to the assessment levied upon premises indicated as No. 39 on the benefit map, on the ground that the commissioners have no authority to assess said property for more than one-half its tax valuation, as fixed on the date of vesting the title in this proceeding, to wit, September 6, 1897. It is conceded that the proposed assessment on this parcel is $550.50, and that its tax valuation in 1897 was $500. It is, therefore, contended that the commissioners have no authority to impose a greater assessment than $250, being limited by section 981 of the Consolidation Act, chapter 410 of the Laws of 1882, to assessing only one-half of the valuation of the property, as valued by the tax commissioners. This objection cannot be sustained for the reason that it has frequently been held that in any street opening proceeding pending when the charter of the Greater New York took effect the commissioners were limited in their assessments by the provisions of the Consolidation Act only in cases where the preliminary report had been filed before the charter took effect, and that in all other proceedings the new provisions of the charter would govern. Matter of Whitlock Ave., 51 App. Div. 436; Matter of East One Hundred and Seventy-fifth St., 49 id. 114. It is also conceded that in the present proceeding the commissioners filed their preliminary report on

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December 9, 1898, and I agree with the counsel to the corporation that the proceedings were, therefore, governed by the provision of the Greater New York charter, section 980, which provides that such commissioners shall "in no case assess any house, lot, improved or unimproved lands, more than one-half the value of said house, lot, improved or unimproved land, as valued by them." Inasmuch as it appears that the property in question amounted to at least two city lots, which are worth $1,000 apiece, it is apparent that the provision of the charter of the Greater New York has not been violated. The objections filed to the assessments levied on lands belonging to the trustees of Astor relate to benefit numbers 12, 22, 24, 25 and 26. It appears that this tract of land has a frontage on Jerome and Walton avenues and One Hundred and Seventy-first street, and that the awards for the lands which are taken make a total of $8,610.20, while the assessments against the remaining property aggregate the sum of $10,146.75. It is objected by Mr. Shaw, who appears for the Astor trustees, that the assessment on its face is inequitable as made up by the commissioners, not only with regard to the Astor property, but with regard to other parcels of property along the line of the improvement, and a tabulated statement of the awards by blocks and the assessments on the adjoining property by blocks, running from Townsend avenue to the easterly and westerly side of the area of assessment, on both sides of the improvement, is presented by him. From that statement, which is justified by the papers presented, it appears that there were some buildings taken which were situated upon the block between One Hundred and Seventy-second street and Belmont street, and that the amount of the award is $5,763.81. Of this amount the commissioners assessed one-third upon the city, amounting to $1,921.72, leaving $3,842 of the awards for buildings to be assessed along the line of the improvement. It also appears that all the property between One Hundred and Seventieth and One Hundred and Seventy-first streets, which is taken in this proceeding, is awarded the sum of $7,131.67, and that the total amount assessed on either side of the improvement, from Townsend avenue to the outer area of assessment on both sides of the improvement, is $9,179.56, or $2,047.89 more than the actual cost of the improvement. On the next block it appears that a small piece of property owned by the Astor trustees is taken, for which an award has been made of $1,515.30. The

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total awards on that block are $8,691.95, and the commissioners have assessed upon the property on either side of the improvement $8,178.91, so that where, in the one instance, they paid $7,131, they assessed back on both sides of the improvement $9,179, while in the other instance, where they paid $8,691, they assessed back on both sides of the improvement, $8,178; that is, in one case they assessed about thirty per cent. more than the cost of the improvement, while in the other case they assessed only ninety per cent. of the cost of the improvement. On the block between One Hundred and Seventy-second and Belmont streets, it appears that the total land damages amount to $21,563, and that the assessments on both sides of the improvement, from Townsend avenue to the outer edge of the area of the assessment, is $17,287, being a little less than eighty per cent. of the land damages. This does not include $3,842, the amount of the award for buildings, which is left to be assessed after the assessment upon the city of $1,921; being one-third of the award for the said buildings, and, adding this $3,842 to the land damages, there is a total of $25,405 awarded to the owners of property taken, while these blocks were only assessed $17,287, not quite seventy per cent. of the cost. I agree with the counsel for the Astor trustees that the rule of apportionment for benefit along the line of the improvement is, therefore, irrational, inequitable and unjust, and it seems to me that the court is bound, under such circumstances, to send back the report for revision and correction. In other words, while I fully recognize that, upon questions of benefit and damage, the commissioners' report is entitled to more respect than the verdict of a jury, it seems to me that the apportionment that has been made of the assessments along the line of this improvement are violative of principle and ought not to be sustained. Draw order accordingly and settle on two days' notice.

Ordered accordingly.

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ROBERT L. NILES, Plaintiff, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD Co. et al., Defendants.

(Supreme Court, New York Special Term, May, 1901.)

Corporation — Tort against not actionable by a minority stockholder as an individual — Parties — Demurrer to complaint.

A minority stockholder cannot as an individual maintain an action for damages his stock sustained by the defendants' tortious acts in improperly procuring and forcing (with the consent of a majority of the stockholders) the foreclosure of a mortgage upon the property of his corporation to the end that the defendants might gain control of it — the foreclosure resulting in greatly reducing, if not annihilating, the value of the plaintiff's stock — as the primary injury has been done to the corporation foreclosed, the injury to its stockholders is derivative and suffered under it, and the plaintiff's injury is not peculiar to him but is shared by all the other stockholders.

The primary right to sue is in the corporation foreclosed and, where it refuses to sue, it is a necessary party to an action brought on behalf of all others similarly situated to procure the relief which the corporation refuses to seek.

DEMURRER to complaint.

Simon Sterne, and Guggenheimer, Untermyer & Marshall (Louis Marshall, of counsel), for plaintiff.

Ira A. Place (Thomas Thacher, of counsel), for defendants.

LEVENTRITT, J. I am constrained to sustain this demurrer. The pleading is certainly not deficient in equity, but, on authority, the action at law adopted by the plaintiff cannot be maintained. It is unnecessary to rehearse the facts; they have been sufficiently spread on the court records in the various proceedings heretofore instituted arising out of the same transactions for which this plaintiff seeks relief. Farmers' Loan & Trust Co. v. New York & Northern R. Co., 150 N. Y. 410; De Neufville v. N. Y. & N. R. Co., 81 Fed. Repr. 10; Oelbermann v. New York & N. R. Co., 7 Misc. Rep. 352. This is not a representative action brought by the plaintiff on behalf of himself and

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others similarly situated, but is purely an action at law to recover damages sustained by the plaintiff and his assignors by reason of the tortious acts of the defendants, resulting, it is claimed, in the destruction of the market value of the stock of the plaintiff and of his assignors in the New York & Northern Railway Company. The injury complained of was not done directly to the plaintiff's property; it was not an injury done peculiarly to him; he has not sustained damage, individual and separable from other minority shareholders. The body corporate to which they jointly confided the protection of their interests has suffered substantial injury by the alleged improper foreclosure of the mortgage and the resultant deprivation of its property under the decree and sale. Consequent upon this abstraction of the corporate property, there has been depreciation, if not annihilation, of share-value. Restoration to the corporation of the property, or its money equivalent, will reinfuse vitality into the stock. The primal injury has been to the corporation, the consequent injury to the body of shareholders composing it. Merely because the body injured is in this instance the minority shareholders, inasmuch as the majority, acting through the instrumentality of another corporation, is charged with the commission of the very acts against which relief is sought, does not make the injury a direct one to the minority. The majority, whether acting alone or, as in this case, through the defendant corporation, has acted in opposition to the true interests of the injured corporation. Its acts, on the allegations of the pleading, have dissipated the corporate assets. And the right of action for the wrong inheres in the corporation itself for the benefit of the shareholders which it represents, and, on the grounds stated, in the corporation alone. If it refuses to seek redress for any of the many reasons often met with, the shareholder may sue in a representative capacity, making it a defendant, but, so suing, the shareholder seeks a recovery, in the first instance, not directly for himself and others similarly situated, but for the corporation whose property and business condition give his shares value. Viewed in any aspect, under any form of pleading or action, the acts and omissions from which the cause of action is sought to be deduced show that it is dependent on a general injury to the corporation, from which has flowed a general, uniform injury to a body of the shareholders. The authorities are quite uniform that, on the state of facts here disclosed, the wrong was done

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to the Northern Company alone; that it is the only party to bring this action, or, failing to do so after request, becomes a necessary party in a representative action duly instituted to obtain the relief it refuses to seek. Gardiner v. Pollard, 10 Bosw. 674; Greaves v. Gouge, 49 How. Pr. 79; 52 id. 58; 69 N. Y. 154; Alexander v. Donohoe, 143 id. 203; Flynn v. Brooklyn City R. R. Co., 158 id. 493; De Neufville v. N. Y. & N. R. Co., 81 Fed. Repr. 10.

That the distinction here invoked is not merely formal, but substantial, was pointed out in Gardiner v. Pollard, *supra*, where it was said: "If the plaintiff can maintain this suit, and recover on it his aliquot part of the whole damages, he may obtain a double compensation, by means of the recovery in his suit and in one by the corporation for the same cause." In approving this distinction, the General Term of the Supreme Court in Greaves v. Gouge, *supra*, declared it "to be an indispensable prerequisite that the circumstances disclosed should show injuries, individual and personal, to the claimant, as contradistinguished from injuries to the corporation. * * * When the plaintiff is able, by the peculiar and special circumstances of his case, to disconnect himself from the general injury to the company, he then presents an independent demand for which he can recover but one redress, and for which the defendant can pay but one penalty." The plaintiff seeks to distinguish the line of cases cited on the ground that in those there was no direct injury to the stockholders. But it is difficult to see how it is more direct here. Merely changing the form of action does not make it so. In a sense, every injury which impairs the value of property is a direct injury to that property and to the person owning it. But that is not the sense in which direct is here used. The injury is not direct because it affects the share values, whether of the whole issue or of a majority or minority only, *through* the body corporate. Whatever may be the effect of the alleged unlawful acts, they were not directed against the individual shareholders as shareholders. If they purposed an acquisition of the Northern Railway's property through the instrumentality of a forced foreclosure, the injury was first to the corporation, and, through it, by the loss of assets, to the stock.

The cases of Ritchie v. McMullen, 79 Fed. Repr. 522, and Walsham v. Stainton, 1 De G., J. & S. 678, do not bear out the construction placed upon them. In each case there was an

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individual wrong, a breach of duty cast upon the managers under a specific relation of legal privity. In the former the directors were the pledgees of the plaintiff's stock, and it was held that, as to their pledgor, they could not so use their positions as directors as to depreciate the value of his stock, and that doing so they would become personally responsible to him for the individual wrong so inflicted. So, too, in Walsham v. Stainton, there was the relation of vendor and vendee. In both cases the directors used their positions to injure particular stock.

Taking the allegations of the complaint as true, there is no doubt, under the decision of the Court of Appeals (Farmers' Loan & Trust Co. v. N. Y. & N. R. Co., *supra*), that there has been a grievous breach of trust. But the remedy does not lie in the individual stockholder, in his individual capacity, in the form of action here sought to be asserted.

The demurrer must be sustained.

Demurrer sustained.

ARNOLD C. MESSLER, Plaintiff, *v.* SCHWARZKOPF & DORER (Ltd.), Defendant.

(Supreme Court, New York Trial Term, May, 1901.)

Amendment — Foreign joint-stock association sued as a partnership — Mistrial — Code C. P., § 1919.

A complaint will not be dismissed as failing to state facts sufficient to constitute a cause of action merely because the plaintiff has sued a foreign joint-stock association as a partnership, the objection being taken in the first instance upon the trial.

The court, in the interests of justice and in the absence of proof of the foreign law, will treat the proceeding had as a mistrial, will assume that the proper officer of the association was served, that his official designation was omitted by the plaintiff in the title of the action, and will permit the latter to amend, on terms, so as to bring the matter within Code C. P., § 1919, permitting an action against the president or treasurer of a joint-stock association.

DEMURRER to complaint at opening of trial.

Geo. W. Galinger, for plaintiff.

Chas. E. Hill, for defendant.

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McAdam, J. The action is to recover a balance claimed to be due on sales and deliveries of goods to defendant. The plaintiff alleges, and the defendant admits, that the defendant was and is a joint-stock association, organized and created under the laws of New Jersey. The defendant put in issue the other allegations of the complaint, and set up defenses and a counterclaim to the cause of action. On the trial the defendant, before the introduction of any evidence, moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action; the theory of the defense being that, as the defendant was a joint-stock association, all the members of the association should be sued, unless the number of associates was seven or more, in which event an action against the president or treasurer would be authorized. Code, § 1919. At common law, the members of the defendant association are liable as partners. People ex rel. Winchester v. Coleman, 133 N. Y. 279, 285; and see Laws of 1894, chap. 235. In the absence of proof, it will be presumed that the common law exists in New Jersey (Wooden v. Western N. Y. & Penn. R. R. Co., 126 N. Y. 10), and the only modification made by the statutes of the forum, which are controlling on questions of procedure (Pritchard v. Norton, 106 U. S. 124; Clancy v. Terhune, 1 City Court, 239), is to allow suit to be brought against the president or treasurer of such association where the associates number seven or more. Code, § 1919. In England and in many of the States, statutes have been passed permitting suits by and against partnerships in their firm name. 2 Bates' Part., § 1059. In the absence of such legislation, it is improper to sue a partnership as an entity, but it does not necessarily follow that the defendant may demur on the ground that the complaint does not state facts sufficient to constitute a cause of action. See Bannerman v. Quackenbush, 11 Daly, 529. The plaintiff here, like the plaintiff in McKane v. Democratic General Committee, 14 Civ. Pro. 126, endeavors to bring into court the voluntary association against which he seeks to enforce a right; and, in the case cited, the court held that the plaintiff was entitled to amend on terms. Assuming, as the court will, for present purposes, that the plaintiff caused the proper officer of the association to be served with process, and has simply omitted to name that officer with his official designation in the title of the action, the plaintiff ought to have an opportunity of applying at Special Term for leave to make the necessary amendment

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of the summons and complaint. McKane v. Democratic General Committee, *supra;* Munzinger v. Courier Co., 24 Civ. Pro. 175; Butler Hard Rubber Co. v. Solomon Toube Co., 2 City Court, 41. In furtherance of justice, the court will decline to treat the proceeding at the Trial Term other than as a mistrial, unless plaintiff, within thirty days, neglects to make said motion at Special Term, or, after making the motion, fails to obtain leave for the proper amendment, in the event of which neglect or failure the complaint will be dismissed, with costs.

Ordered accordingly.

EDGAR WEINBERGER, Plaintiff, *v.* HERMAN KRATZENSTEIN et al., Defendants.

(Supreme Court, New York Trial Term, May, 1901.)

Negligence — Failure to provide a freight elevator in New York city with trap-doors and a substantial guard or gate — L. 1892, ch. 275, § 28.

The act creating a department of buildings in the city of New York (L. 1892, ch. 275, § 28), and requiring any hoistway or freight elevator or well-hole, not of fire proof construction, to be protected by "a substantial guard or gate and with such good and sufficient trap-doors with which to close the same," as may be directed and approved by the city superintendent of buildings, also declares that trap-doors need not be closed until the close of business, and hence, where a person is injured during business hours by falling down the elevator shaft of premises because the guard chain of the shaft broke when he leaned against it, he cannot recover damages of the owners of the premises upon the ground that they had failed to provide the elevator shaft with the statutory trap-doors as the presence of open trap-doors would not have prevented the accident.

An iron chain firmly fixed in the wall of an elevator shaft at one of its ends and hooked at the other end into an eye-bolt or staple set into the opposite wall, and apparently in proper condition, is a sufficient compliance upon the part of the owners of the building with the said statute requiring "a substantial guard or gate" for the shaft.

ACTION for negligence.

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Kurzman & Frankenheimer, for plaintiff.

Nadal, Smyth & Carrere, for defendants.

SCOTT, J. The action is for damages for an injury suffered by the plaintiff by falling into an elevator shaft or well. On the trial, the complaint was dismissed as against the defendants Kratzenstein and others, tenants of a portion of the building in which the accident occurred, and the jury found a verdict against the defendants Hasell and others, the owners of the building. The shaft or well was inclosed on three sides, and was protected as to its open side by an iron chain fixed firmly in the wall at one end, and provided with a hook at the other end, which hooked into an eye-bolt or staple in the wall. There was no evidence that either the chain or the eye-bolt was out of repair, or, at least, if they were, that their deficiencies were apparent or known to the owner or anyone else. The plaintiff, desiring to look up the shaft to ascertain the position of the elevator, leaned upon the chain, which gave way and permitted him to fall to the bottom of the shaft. The defendants' negligence is predicated upon the contention that they failed to comply with section 28 of chapter 275, Laws of 1892, which was in force when the accident occurred. That section reads as follows: "In any building in which there shall be any hoist way or freight elevator or well-hole not inclosed in walls constructed of brick or other fire-proof material and provided with fire-proof doors, the openings thereof through and upon each floor of said building, shall be provided with and protected by a substantial guard or gate and with such good and sufficient trap-doors with which to close the same, as may be directed and approved by the superintendent of buildings; and the said superintendent shall have exclusive power and authority within said city to require the openings of hoist-ways or hoist-way shafts, elevators and well-holes in buildings to be inclosed or secured by trap-doors, guards or gates and railings. Such guards or gates shall be kept closed at all times, except when in actual use and the trap-doors shall be closed at the close of business of each day by the occupant or occupants of the building having the use or control of the same."

It did not appear that the defendants had ever provided any

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trap door or other door to the elevator shaft at the point where the accident happened, or that the superintendent of buildings had ever directed any such door to be provided. The plaintiff contends that this omission of itself constituted negligence, and cites McRickard v. Flint, 114 N. Y. 222, to support his contention. That case, however, differs in essential particulars from the case at bar. The statute applicable to that case (Laws of 1874, chap. 547, § 5) provided that "elevator or well-hole * * * shall be provided with and protected by a substantial railing and such good and sufficient trap-doors with which to close the same as may be directed and approved by the superintendent of buildings," being to this extent similar to the act applicable to the present case, except that in the act of 1874 a "substantial railing" was required, while under the act of 1892 a wider discretion is given to the owner by permitting the use of a "substantial guard or gate." There is, however, a very important difference between the two statutes as to the use of the "trap door." By the act of 1874 it was provided that the trap door "shall be kept closed at all times except when in actual use by the occupant or occupants of the building having the use and control of the same." Under this statute it was the duty of the occupant not only to provide a trap door, but to keep it closed at all times, whether during business hours or not, when the hoistway was not actually in use. The act of 1892, however, contains no such provision. The "guards or gates" are to be kept closed at all times except when in actual use, but the trap doors are only to be "closed at the close of the business of each day," and hence could lawfully be kept open continuously during business hours, whether the elevator was actually in use or not. The accident in question occurred during business hours, when the trap doors, even if provided, need not have been kept closed, but might lawfully have been open. The presence of an unclosed trap door would not have prevented the accident which occurred, and hence the fact that there was no such door in existence cannot be said to have contributed to the accident. The mere fact that a person has violated a law is not sufficient to charge him with liability for an accident, unless the violation of the statute has something to do with the occurrence of the accident. Stewart v. Ferguson, 34 App. Div. 515–521. It is impossible to say that the failure to provide a trap door, which, if provided, might lawfully have been kept

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open, contributed to the happening of the accident. The other question is whether a chain such as was provided was a "substantial gate or guard." This precise question was before the Court of Appeals in Malloy v. N. Y. Real Estate Assn., 156 N. Y. 205. The statute under consideration in that case required elevator shafts to be protected by a "substantial railing." The owner provided a chain. The evidence showed, as was shown in the case at bar, that such a guard was very commonly used in the city of New York to protect elevator shafts, and the court held that the use of such a chain was a sufficient compliance with the statute. In the face of the evidence of the common use of a chain for such purpose, and in the absence of any evidence to show that the chain used was actually defective, or that its defects, if any, were so apparent that a careful inspection by the owner would have disclosed them to him, there was no question to submit to the jury, and the complaint should have been dismissed as to him.

The motion to set aside the verdict and for a new trial must be granted. The plaintiff may have thirty days' stay of execution, after entry of judgment, within which to perfect an appeal, and sixty days to make and serve a case on appeal.

Ordered accordingly.

FREDERICK G. MASON, as Assignee, Etc., Plaintiff, *v.* THE EVENING STAR NEWSPAPER CO. OF WASHINGTON, D. C., Defendant.

(Supreme Court, New York Special Term, May, 1901.)

Consolidation of causes in the same court — Code C. P., § 817.

Where two actions were brought in the same court by the same plaintiff against the same defendant for damages for breach of the same contract, and it appeared that in one case the plaintiff claimed as general assignee of a domestic corporation and in the other as particular assignee of a foreign corporation bearing the same name, and it was doubtful which of these corporations the defendant really contracted with, the court refused to grant the defendant's motion to consolidate the two actions unless the defendant stipulated that the plaintiff should be permitted to elect with which action the other should be consolidated, that the defendant would not, by demurrer

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or otherwise, object that the two causes of action were improperly united in the same action, nor suggest, before verdict rendered, by motion or otherwise, that the plaintiff be called upon to elect upon which cause of action he would stand.

ACTIONS to recover damages for breach of contract. Motion to consolidate the actions.

William C. Davis, for plaintiff.

Swayne, Swayne, Morris & Fay, for defendant.

SCOTT, J. These are two actions by the same plaintiff against the same defendant, brought to recover damages for the breach of the same contract. The motion is to consolidate them. Such a motion is addressed to the sound discretion of the court. Code Civ. Pro., § 817. The defendant made a contract with a corporation known as the Associated Press for the furnishing of news for a stated price per week. This contract was assigned by the Associated Press to another corporation known as the United Press, which assignment, as it is alleged, was consented to and acquiesced in by the defendant. It is further alleged that, after the assignment of the contract, the United Press continued to fulfill the obligations originally undertaken by the Associated Press, until the defendant refused further to abide by the contract, and for this refusal the present actions are brought. It appears, however, that there were two corporations known as the United Press, one organized under the laws of the State of Illinois, and the other under the laws of the State of New York. Their affairs seem to have been somewhat interwoven, and there is a question to which of the corporations thus bearing the same name the contract between the defendant and the Associated Press was assigned. The plaintiff is assignee for benefit of the creditors of the United Press of New York, and, as such, brought one of these actions, claiming that the contract in question had been assigned to that corporation. The United Press of Illinois, claiming that it was to it that said contract had been assigned, executed an assignment of its claim for damages thereunder to one Walter P. Phillips, who began an action in this court against the defendant to recover damages for the breach of said contract.

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Subsequently, Phillips assigned any claim for damages he might have to the plaintiff, who was substituted as plaintiff in the action originally brought by said Phillips. To justify a consolidation of two actions, it is not sufficient to show that they are between the same parties, and that the causes of action are such as may be joined in one complaint. So much must be shown, at all events, and, until it is shown, no occasion arises for the court to exercise its discretion. In order to call into operation the discretion of the court in favor of the motion to consolidate, the defendant must go further and show either that no defense is intended, or that the questions which will arise are substantially the same in both actions. When different questions are to be litigated, it is usual for the court to deny the application. Wilkinson v. Johnson, 4 Hill, 46; Dunning v. Bank of Auburn, 19 Wend. 23. The reason given for this rule, which is, that the witnesses may be different in the two suits, and that the jury may be embarrassed by the investigation upon one trial of several transactions having no connection with each other, does not apply to the present case, because the evidence will be substantially the same in each case, the question being as to what inference should be drawn from the facts as to the identity of the particular United Press to which the assignment was made by the Associated Press. As the case stands at present, the plaintiff says to the defendant: "You made a contract with one of two corporations bearing the same name. That contract you broke. I do not know with which corporation you contracted, but I hold the assignment of the claims of both, and therefore am entitled to recover damages in either case." The defendant does not deny that it made a contract with one of the two corporations, but leaves it to the plaintiff to show with which particular corporation it so contracted. Clearly, there is here a single issue which ought, if possible, to be tried in a single action. The plaintiff, however, apprehends that if the actions be consolidated he may be confronted with one or both of two embarrassments. First, it may be said that the claims are inconsistent and, therefore, cannot be united in a single action, and, second, he may now, or at some future time, be called upon to elect upon which cause of action he will stand. It is doubtful whether the claims can be said to be inconsistent, because they are both for the same breach of the same contract. The question of election is, however, more serious. The plaintiff himself does not seem to have been a party

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to, or in any wise connected with, the assignment of the contract from the Associated Press to the United Press. He has, therefore, no knowledge as to which United Press was the assignee of the contract than the defendant has. All he can do is to present the facts to the court, leaving it to the jury to say which United Press was the true assignee. If the actions are consolidated, that question will not even be important, because the plaintiff alleges that he holds whatever claim either had. He should not be called upon to run any risk as to what the jury may find upon the state of facts which will be presented. The motion to consolidate will be granted upon the following terms: First, that the plaintiff be permitted to elect with which action the other shall be consolidated. Second, that the defendant stipulate that it will not, by demurrer or otherwise, object that the two causes of action are improperly united in the same action, and will further stipulate that no motion or suggestion will be made, at any time before the verdict is rendered, that the plaintiff be called upon to elect upon which claim he will stand. If the defendant is unwilling to thus stipulate, the motion to consolidate will be denied, with ten dollars costs.

Ordered accordingly.

THE MEDICAL COLLEGE LABORATORY OF THE CITY OF NEW YORK, Plaintiff, *v.* THE NEW YORK UNIVERSITY, Defendant.

(Supreme Court, New York Special Term, May, 1901.)

Equity — Will compel a transferee to reconvey property acquired for a void consideration.

Where the sole consideration for the conveyance of real and personal property is a promise which the transferee has not kept, equity will compel the transferee to reconvey even though the promise was void.

ACTION to compel the reconveyance of real and personal property.

Elihu Root and Bronson Winthrop, for plaintiff.

Geo. A. Strong, for defendant.

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TRUAX, J. The evidence shows that the sole consideration for the conveyance of the property mentioned in the complaint by the plaintiff to the defendant was the promise, on the part of the defendant, that the medical committee of the defendant should always remain constituted of people who were acceptable and satisfactory to the governing faculty of the plaintiff; that, as vacancies occurred in said committee, they should be filled by the appointment of persons who were agreeable and acceptable to the plaintiff, and that that committee, so constituted, would have and should have the entire management and control of the property mentioned in the complaint. The evidence also shows that the agreement, which furnished the consideration for the transfer as above stated, has not been kept. It is claimed, however, on the part of the defendant, that the alleged promise, if ever made, involved a plain breach of trust, and was not binding upon the defendant. Whether such promise was unauthorized by the defendant, or whether the making of it was a breach of trust, is immaterial. In either event, defendant should not be allowed to keep the property it received through the making of the promise. It is well settled that a party to a void contract cannot repudiate it and still retain what he has received under it. Day v. N. Y. C. R. R. Co., 51 N. Y. 583; Reed v. McConnell, 133 id. 425, 435; Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24–60. That equity can compel restitution where one of the parties to a void contract avails himself of its invalidity, but unconscientiously appropriates what he has acquired under it, is fully sustained by the following authorities: Ryan v. Dox, 34 N. Y. 307; Peck v. Hoyt, 39 Conn. 9; Penfield v. Penfield, 41 id. 474; Randall v. Constans, 33 Minn. 329; Dix v. Marcy, 116 Mass. 416; Davies v. Otty, 35 Beav. 208. Judgment is ordered for the plaintiff, with costs, directing the defendant to reconvey the property, both real and personal, mentioned and described in the conveyance of February 8, 1897, to the plaintiff, and directing the defendant to deliver to the plaintiff the possession of such property, and that, pending such conveyance, the defendant be enjoined and restrained from disposing of or in any way interfering with said property or any part thereof. Let judgment be settled on notice.

Judgment accordingly.

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THE NEW YORK UNIVERSITY, Plaintiff, *v.* THE LOOMIS LABORATORY, Defendant.

(Supreme Court, New York Special Term, May, 1901.)

Action to impress a trust — Failure of proof.

An action to impress, upon all the property of a laboratory, a trust in favor of the medical department of a university must fail where the testimony of the donor of the *corpus*, offered in the action, indicates that he did not intend to create such a trust, and where the act (L. 1887, ch. 329) creating the laboratory merely empowered it to hold property for its own purposes, authorized its trustees to convey all its property to the university and declared that, upon such conveyance being made, the laboratory should cease to exist.

ACTION to impress a trust, in favor of the plaintiff, upon all the property of the defendant.

Duer, Strong & Whitehead, for plaintiff.

Chas. E. Miller, for defendant.

TRUAX, J. The right of the plaintiff to obtain the relief asked for in the complaint depends on proving the allegation contained in the complaint, that a trust for the benefit of the plaintiff affecting the property mentioned and described in the complaint had been created. This trust, as stated in the complaint, was that the property mentioned and described in the complaint should be handed over to a board of trustees, which was to hold it in trust for the exclusive use of the faculty and students of the medical department of the New York University. If that allegation has been proved, plaintiff is entitled to the relief asked for; if that allegation has not been proved, plaintiff is not entitled to such relief. The burden of sustaining the allegation by competent evidence rests upon the plaintiff. Now, whatever the parties may have intended to do in 1886, what the evidence shows they did does not establish a trust in the property of the kind set up in the complaint for the benefit of the plaintiff. The creator of the alleged trust was called as a witness on the trial, and tes-

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tified, in effect, that he had not created and, in fact, had not intended to create a trust for the benefit of the plaintiff. Perhaps, the best evidence of what was done is to be found in the act creating the defendant, which act was passed for the purpose of carrying out the wishes, and, for that reason, must be supposed to express the wishes, of the creator of the alleged trust. That act (Laws of 1887, chap. 329) authorizes the defendant to hold real estate (in trust or perpetuity or otherwise) for the purpose of establishing, supporting and maintaining in the city of New York an institution for the promotion of original research in chemistry, biology, pathology, and for elementary teaching in those branches. Nothing in the act authorizes it to hold property in trust for the plaintiff. That act also authorizes the trustees of the defendant to convey to the plaintiff, and this means to convey in fee, all the property, both real and personal, and also provides that on such conveyance the corporation created by the act shall cease to exist. For the reasons above stated, the complaint is dismissed, with costs.

Complaint dismissed, with costs.

JOSEPHINE G. RAYNOR, FRANCIS J. GILMAN and JULIA H. COLEMAN, Plaintiffs, *v.* THE SYRACUSE UNIVERSITY, Defendant.

(Supreme Court, Onondaga Special Term, May, 1901.)

Abatement of an alleged nuisance in a street refused to an individual where the street was not necessary for access to his lands and would, if abatement were adjudged, be only a cul de sac — Deed — Construction — Acceptance and delivery — Priority — Dedication and abandonment of way — "At any time" construed.

In September, 1871, a woman, the owner of a tract of city land, contracted to convey the northern part of it by a full covenant warranty deed and her vendee, a university, covenanted and "irrevocably consented" that the city might "at any time" continue a street known as Chestnut, running northerly and southerly, from its then present southern terminus upon and across the lands to be granted and the lands retained by the woman southerly towards a cemetery, which was the southern boundary of all her lands. The terminus of the street at that time was not upon her lands but was north of them, and between her lands retained and the terminus there was a section

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of the proposed continuation having as owners or abutting owners the city and the university, whom she had no right to compel to open that section. In May, 1871, she conveyed to the university the premises agreed to be conveyed, including the site of the proposed continuation, "Subject, however, to Chestnut street through said premises as a public highway heretofore laid out and conveyed or dedicated as such highway" by her. On October 30, 1870, she had signed a deed to the city of a strip, across the lands conveyed and those retained by her, "as and for a public street or highway and not otherwise," and only for so long as it remained such. In November, 1870, the common council declared this a public street forever, as shown upon a map. The city never formally accepted this deed but it was acknowledged the day after its date, and the county clerk's certificate to the official character of the notary is dated September 30, 1871, and was recorded October 2, 1871. It appeared that in fact neither the city nor any one else had ever laid out, opened or worked this strip. Chestnut street, if continued, would have given additional access to the lands retained by the woman, and persons claiming under her brought this action to compel the university to remove a structure, in process of construction, which encroached on the continuation of Chestnut street as proposed.

Held, that as the deed to the city was beneficial to it and it had in 1872 granted to a street railroad certain rights of way over the street or strip as defined in the conveyance, acceptance by and delivery to the city would would be presumed as of the day the deed was recorded, October 2, 1871.

That, as the deed to the university was first recorded, the university took title to the fee of the street or strip as against the city.

That, in view of the contract of sale with defendant and of the deeds, the city acquired the right to occupy the strip as a street, but not the fee to the land.

That the city had lost this right by its failure to open and work the street or strip within six years from October 2, 1871 (L. 1861, ch. 311, § 1), and that the facts that the lands laid in a city and that the commissioner of highways had never filed a description of the abandoned highway could not alter this ruling.

That the contract and deed of the woman with the university secured to her no servitude to have the street continued for the benefit of the lands which she retained, that the limit of the obligation of the university was to allow the city to construct the continuation, and that when the city lost its right to do so she had no right against the university.

That the provision of the contract, that the city might "at any time" continue the street, was merged and satisfied by her deeds to

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the university and to the city, and that, if this were not so, the phrase "at any time" must be construed to mean that the city must act within a reasonable time.

That the parties claiming under the woman were not entitled to relief against the university, as there was a necessary intervening section of the street which they were not entitled to have opened and, therefore, the section that might be opened would as to them amount only to a *cul de sac*.

THIS action is brought to compel the defendant to move one of its buildings, so far as it is erected, and to restrain it from erecting the same, upon the ground that said building encroaches upon Chestnut street or South Crouse avenue, which plaintiffs are entitled to have kept open and maintained as a public street or highway across defendant's premises, and over the spot occupied by said building, and that the same interferes with the rights of plaintiffs in said alleged street.

The facts appear in the opinion.

William G. Tracey, for plaintiffs.

J. B. Brooks and C. H. Lewis, for defendant.

HISCOCK, J. Three questions are presented in this case by the pleadings and proof. They are:

First. What rights were originally secured by the public or by the plaintiffs' ancestor and source of title to have what was then known as Chestnut street (and now as South Crouse avenue) extended over defendant's premises, and over and through the spot now occupied by its Hall of Sciences, which is the building and encroachment complained of herein?

Second. Have any rights originally secured by either the public or the plaintiffs' ancestor been lost through abandonment, nonuser or otherwise?

Third. Does said building, under existing conditions, so encroach upon or impair any substantial or material right of the plaintiffs as will lead a court of equity to cause its abatement and removal?

I shall consider the material facts which I regard as established in this case in connection with and relating to each of said questions separately, rather than attempt to make one general statement thereof.

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When defendant set about acquiring the lands upon which to institute and build its university, it acquired a large proportion thereof from three owners or sets of owners upon farm lots 201, 186 and 187 in Syracuse. Those upon farm lot 201 were obtained from one Smith and from Sperry and Short. Those upon lots 186 and 187 were obtained from Lucy Maria Raynor, the mother and source of title of these plaintiffs. Short and Sperry conveyed all their lands at that point. Both Smith and Mrs. Raynor retained other adjacent lands. There was more or less negotiation between said parties and the defendant and the city of Syracuse, with reference to running streets through the tract of land composed of what was conveyed to the defendant, and what was retained by said grantors, Smith and Raynor. The lands retained by Mrs. Raynor laid between the southerly boundary of those conveyed to the defendant and the northerly boundary of Oakwood Cemetery. Those retained by Mr. Smith laid easterly of the ones conveyed to the University. Chestnut street had been opened and used by the public, as it extended in a generally southerly direction from East Genesee street towards the lands acquired by the defendant. Some reference is made to it in the conveyance of one Longstreet, who was an earlier owner and source of title of some of the lands in question upon farm lot 201, as extending upon said lands. It is referred to as a boundary in some of the earlier deeds. Also a resolution had been passed by the common council of Syracuse in 1852, that Chestnut street, as so referred to, be continued southerly to the south line of farm lot No. 201. But, as a matter of fact, it had never been laid out, opened or in any manner used as a street on or crossing the premises in question.

The old Chestnut street, as so referred to, was laid out in straight lines across the premises purchased by defendant upon farm lot 201, extending only to the south line of said lot, and not at all upon or across the premises purchased of Mrs. Raynor. In the negotiations for the purchase by defendant of the lands hereinbefore referred to, and which included the subject of continuing Chestnut street across the lands of Mrs. Raynor, it was decided to change somewhat the lines of said street upon farm lot 201 and to provide for a course across said lot and across farm lots 186 and 187 upon curved lines. Accordingly, October 31, 1870, George F. Comstock, Thomas B. Fitch and Charles Andrews, acting as a committee for the defendant, presented a peti-

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tion to the common council of the city of Syracuse, asking that said street might be slightly altered near its southern terminus (the southerly line of farm lot 201), and continued southward to Oakwood Cemetery through lands of Mrs. Raynor, "part of which are expected to be conveyed to the Syracuse University." They represented that Mrs. Raynor and the University and all other parties interested were agreed upon the proposed line of said street, which was described in a survey and represented on a map made by one Clarke, and which is in evidence in this case. Subsequently, and upon November 7, 1870, the common council passed a resolution, changing the line of Chestnut street, as theretofore described, across lot 201, and continuing and extending it over lots 186 and 187 to the north boundary of Oakwood Cemetery for a width of sixty-six feet, in accordance with the lines and directions indicated in the petition and map last above referred to. Said resolution also provided that the strip of land so described "be and the same is hereby declared a public street or highway forever." It also recited that "the owners of the lands included in and affected by the said alteration and extension of Chestnut Street have dedicated the same to the City for the uses and purposes of such street." In the purchase of lands by defendant from Smith, provision had been made by a deed from Smith to the city for said new Chestnut street across lot 201, and which will be more fully considered hereafter. Likewise, provision had been made by the contract and deed between Mrs. Raynor and the defendant and by a deed from Mrs. Raynor to the city for said new street across the lands conveyed by her to defendant, and also those retained by her south thereof, and which I will now consider.

The negotiations between Smith, the defendant and the city and those between Mrs. Raynor, the defendant and the city were separate. There was no general contract or proceeding to which all were parties which provided for the new street through all of the premises conveyed by both parties. Each grantor dealt separately in his own behalf.

September 23, 1870, Mrs. Raynor made a contract with the defendant for the sale to it of the lands already referred to, and which consisted of about thirty-three acres, and which included the site of Chestnut street. The grantor agreed, upon payment being made, as in said contract provided, that she would convey "a good indefeasible title to said premises to said party of the

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second part by a good warranty deed with full covenants." There was no exception or reservation of any land for a proposed street across said premises, but said contract contained a clause wherein said University "covenants and gives its consent irrevocably that the public authorities of the city of Syracuse may at any time continue and lay out Chestnut street from its present southern terminus (the southerly line of Farm Lot 201) upon and across the premises above described in a direction toward Oakwood Cemetery." Provision also was made for the extension of what is known as Irving street southerly upon the westerly side of said premises as has subsequently in fact been done; also for a street eighty feet wide running east and west on the line between the premises conveyed to the defendant and other lands retained by Mrs. Raynor and which street has been indicated upon various maps as Croton street, but has in fact never been laid out or worked or used by the public.

On or about May 1, 1871, Mrs. Raynor executed to the University a conveyance for the purpose of carrying out said contract. Said conveyance was a warranty deed which purported to convey thirty-three and three hundred and seventy-two one-thousandths acres of land *including the site of said street* and the spot whereon now stands the building complained of. Immediately following the description of said premises therein is the following clause: "Subject, however, to Chestnut Street through said premises as a public highway heretofore laid out and conveyed or dedicated as such highway by the party of the first part." Otherwise there is no reference to said street and no exception or reservation covering the same. Mrs. Raynor executed a deed, dated October 30, 1870, to the city of Syracuse, whereby by warranty deed she conveyed a strip of land sixty-six feet wide across the premises, conveyed by her to the defendant and retained by her south thereof, to Oakwood and upon the new line of Chestnut street already referred to, "To have and to hold the said strip or parcel of land so far as the same is part and parcel of said Farm Lots Nos. 186 and 187 unto the said party of the second part thereafter as and for a public street or highway and not otherwise," and her covenant of warranty provided that it should apply only so long as said premises should "continue to be a public street or highway." Said deed was acknowledged the day after its date. A certificate of a county clerk to the official character of the person who took the acknowl-

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edgment is dated September 30, 1871, and the deed was not recorded until October 2, 1871. Two questions have arisen in regard to the legality and effect of this deed. The first one is presented by the contention of the defendant that there is no evidence that it was ever delivered to or accepted by the city of Syracuse. There is no direct verbal evidence upon this subject, but there are circumstances from which I think such delivery and acceptance can be fairly found. The deed was placed upon record October 2, 1871, and if such a conveyance is to be regarded as a beneficial one for the grantee the presumption of acceptance would flow from such record. Independent of that presumption, however, a resolution was passed by the common council of the city of Syracuse, in 1872, granting to a street railroad certain rights of way over the street as outlined and defined in the conveyance in question. And this fact, in my opinion, in connection with the recording of the deed, is sufficient to warrant a finding of acceptance and delivery.

The second question relates to the effect of the deed as against the defendant. As already stated, on or about May 1, 1871, Mrs. Raynor had executed to the defendant a warranty deed of premises which included those conveyed by her to the city of Syracuse just referred to and which deed was put on record a couple of days later and thus several months before the deed to the city was recorded, and the query thus arises, what rights did the city of Syracuse acquire as against the University in the premises marked out for the street. There is no evidence from which I feel justified in finding that the deed to the city was delivered or accepted before the day of its record. As I have stated, there is no direct evidence of any person to the fact of its ever being delivered to the city, and there is no proof of any act or conduct upon the party of the city or its officials which warrants the presumption that the deed had been delivered prior to the date in question. It has been argued by plaintiffs' counsel that such presumption may be based upon the resolution of the common council adopted November 6, 1870, which was the resolution already referred to changing the course of Chestnut street across the Raynor property from a straight line to a curved one. That resolution contained the following: "Whereas the owners of the land included in and affected by the said alteration and extension of Chestnut Street have *dedicated* the same to the City for the uses and purposes of such street, therefore Further Re-

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solved that the map of such alteration and extension of such street be forthwith filed in the office of the Clerk of the County of Onondaga and a copy or duplicate thereof in the City Clerk's Office." It is to be borne in mind, however, that this resolution was predicated upon a petition presented by George F. Comstock and others asking for the alteration in the course of Chestnut street and in which petition it was stated "That Mrs. Raynor and the said University and all other parties interested are agreed upon the proposed line of said street * * * and that the proper deeds of dedication of the lands required *shall* be given to the city," etc. This petition was dated in Syracuse the same day that Mrs. Raynor executed the deed to the city in New York, and, therefore, it is proper to assume that the petitioners did not have in their possession and present with said petition the deed to the city. And reasoning still further, it seems proper to assume that when the common council in the resolution of November seventh recited that the owners of the land, including Mrs. Raynor, had dedicated the premises included in Chestnut street they based such recital upon the statements and premises of deeds contained in the petition of Judge Comstock and others rather than the actual possession at that time of Mrs. Raynor's deed. If the deed had been delivered at that time the common council would naturally have provided for its record in the same resolution which provided for forthwith filing in the office of the clerk of Onondaga county the map of the alteration which was included in the deed, and the necessary county clerk's certificate to the official character of the officer before whom Mrs. Raynor made her acknowledgment would have been obtained before September 30, 1871, its actual date.

There is no other evidence upon which to base a finding of the delivery and acceptance of this deed at any date prior to the date of its record. I reach the conclusion therefore upon this question that Mrs. Raynor's deed to the defendant was executed and delivered prior to the date when the deed to the city was delivered and that, therefore, the defendant took title to the fee of the proposed street rather than the city.

This conclusion, however, does not bar the other one that the city by its deed as against the defendant acquired the right to use and occupy the premises for a public street. I think that this result and effect was secured by the contract and deed between Mrs. Raynor and the University and that such right in

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behalf of the city is more in accordance with the terms and intent of these instruments than it would be to hold that the city took the fee to the land as against the University. The clause in the contract in question that the city might "at any time continue and lay out Chestnut Street * * * *upon and across* the premises" granted to the University would certainly be more reasonably fulfilled through the enjoyment by the city of a right of way over the premises than by its securing the absolute fee to a strip of land sixty-six feet wide. The clause in the deed to defendant was subject "to Chestnut Street through said premises as a public highway heretofore laid out and conveyed *or dedicated* as such highway," etc. At the time this conveyance was executed concededly outside of its designation upon a map and in resolutions and petitions heretofore referred to Chestnut street had not been "laid out" to any extent, and as I have already indicated outside of any binding force which the clause under consideration may have upon the defendant through acceptance of the deed containing it, there is no sufficient evidence that at this date any conveyance of Chestnut street had been executed by Mrs. Raynor to the city. This clause recites that Chestnut street had been "conveyed *or* dedicated", and even though the conveyance to the city had not been actually executed at this time, defendant is nevertheless, in view both of the contract and of the deed, to be regarded as having taken its conveyance of its premises subject to such rights and exceptions in favor of a public street as may be fairly implied from the language used. It is a well-settled rule that the language of reservations or exceptions in a deed is to be construed more strongly against the grantor and in favor of the grantee. Duryea v. Mayor, 62 N. Y. 592; Jackson v. Blodget, 16 Johns. 172.

Assuming that the reservation in question applied to the deed to the city when executed, or that the defendant is estopped from denying the existence of such rights in favor of the city for a public street over the lands in question as would be naturally implied from the language used in the deed, it seems to me that the rights reserved against it would be satisfied by holding that the city under its deed from Mrs. Raynor and by virtue of the contract and deed between her and the defendant acquired a right of way across defendant's premises for a public street and did not by its deed as against defendant acquire the title to the land.

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Proceeding upon the assumption that by the conveyance from Mrs. Raynor to the city, in accordance with the contract and conveyance between Mrs. Raynor and the defendant, there was dedicated to the public and given to the city the right to continue and lay out Chestnut street upon the lines indicated across the premises now owned by the defendant, and that the city did not acquire the fee to such strip of land, I come now to the consideration of the second question suggested at the beginning of this opinion, whether the city and the plaintiffs, or either of them, have lost any of the rights originally thus acquired.

Concededly during the thirty years which have elapsed since the conveyances referred to nothing has been done by the city or anyone else in the way of laying out, opening up, working or making suitable for travel this portion of the proposed street. It has never been used by the public or the plaintiffs or their grantor as a street, but has lain in common with the other lands owned by the defendant upon each side and subject to use by the latter in such way and to such extent as it desired. It has not been opened and worked within the meaning of the statutory provisions next hereinafter referred to. Horey v. Village of Haverstraw, 124 N. Y. 273; Excelsior Brick Co. v. Village of Haverstraw, 142 id. 146; Beckwith v. Whalen, 70 id. 430.

Under such circumstances, section 1 of chapter 311 of the Laws of 1861, carried into the present Highway Law as section 99 of chapter 568 of the Laws of 1890, applies. The first statute provides that "Every public highway and private road already laid out and dedicated to the use of the public, that shall not have been opened and worked within six years from the time of its being so laid out, and every such highway hereafter to be laid out, that shall not be opened and worked within the like period, shall cease to be a road for any purpose whatever," etc. The latter section provides to substantially the same effect that "Every highway that shall not have been opened and worked within six years from the time it shall have been dedicated to the use of the public or laid out shall cease to be a highway," etc.

An effort has been made by plaintiffs' counsel to draw a distinction between highways in cities and in the country as governed by these statutes. The distinction, however, seems to be one not applicable to this case, if I am right in my conclusion that the city did not secure the fee to the highway. It is settled that where the fee is secured the statutes in question do not apply,

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but otherwise they do apply as well to one class of highways as to the other, and are applicable to the street involved in this action. Ludlow v. City of Oswego, 25 Hun, 260; Woodruff v. Paddock, 56 id. 288; affd., 130 N. Y. 621.

He has also suggested rather than urged very strenuously that this abandonment of a highway does not take effect until the commissioner of highways has filed a description of the abandoned highway as provided by the statute. This, however, does not seem to be the meaning of the language used, and no such construction has been placed upon it by the decisions called to my attention.

I have not considered so much of the alleged street or highway in question as lies north of the premises granted by plaintiffs' ancestor, but the rule is laid down in the case of Horey v. Village of Haverstraw, *supra*, that, even if Chestnut street had been opened and worked as to that portion, it would cease, as to the part heretofore considered, to be a highway, if not opened and worked within the statutory time.

I conclude, therefore, upon this question, that the city of Syracuse has lost its right to open and use for a public highway so much of the original proposed Chestnut street as was granted or dedicated by plaintiffs' ancestor.

Plaintiffs' counsel, however, has earnestly urged that Mrs. Raynor, and, through her, these plaintiffs, acquired a right to have Chestnut street reserved and kept open through the lands granted by them, which was independent of the right granted to the city, and which could not be lost or abandoned through any act or neglect upon the part of the city. He argues that, out of the negotiations and transactions between Mrs. Raynor and the University, as evidenced by the contract and deed referred to, a servitude or easement was imposed upon the lands granted to the latter in favor of those retained by Mrs. Raynor to have Chestnut street maintained as a passage-way, even if not a public street; that this right was created in favor of Mrs. Raynor, the grantor, and continues to exist in favor of her descendants, even though the city has lost its rights.

Counsel cites in behalf of his contention a large number of cases, and especially calls attention to, and seems to rely upon, that line of authorities which hold that where a grantor has conveyed lands, bounding them by a street, his grantee and their grantees have a right to insist that the strip of land described as

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a boundary and street shall be kept open as such for their benefit, even though it has never been opened or dedicated to or accepted by the public. And he further argues that the same principle may be applied inversely in favor of the grantor as against the grantee; that when the grantee has taken a conveyance which apparently recognizes and is subject to a street, the grantor and his representatives and successors may insist upon a street being maintained, even though one has never been created in favor of the public; that an easement may be created in favor of the grantor upon the lands granted in the same way that a right of way may pass as an appurtenance to the grantee in favor of the lands conveyed to him.

The authorities cited do not seem to me to sustain the rights claimed for plaintiffs in this case. Where a grantor conveys lands, in a proper and necessary manner referring to or bounding them by streets, it is well settled, as claimed by counsel, that the grantee has a right to have those streets kept open, even though the public has acquired no such right.

There is an implied covenant that there is such a street, which the grantor is prohibited and estopped from denying. White's Bank of Buffalo v. Nichols, 64 N. Y. 65.

The grantee acquires the right of way as an *appurtenance* to the lands conveyed to him. Cox v. James, 45 N. Y. 557, 561.

It is to be assumed that the grantor has received the full value of the streets in the increased price of the lots sold upon the same. Bissell v. N. Y. C. R. R. Co., 23 N. Y. 61, 66.

But I do not think that, in this case, the defendant has taken its lands subject to any special right of way created in favor of its grantor, but that it took subject only to the right of the city to open and maintain a public street across its premises. It is claimed that it was very desirable for Mrs. Raynor that she should secure a street through the premises granted to defendant for the benefit of the lands lying south thereof, which she retained. Very likely that was so, and undoubtedly she might have secured to herself, and for the benefit of the lands retained by her, a right of way across defendant's premises, which should exist even though the city did not acquire or should lose the right to lay out and open a public street. But, as it seems to me, she did not do this, but limited her rights to, and took her chances upon, the opening and maintenance by the city of a public street, and that she made defendant and its premises subject only to that

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burden and contingency. The clause in the contract for the sale by her to the defendant of its lands, which is the first expression of the agreement between the parties, provides that "the said party of the second part (the defendant herein) hereby covenants and gives its consent irrevocably that the *public authorities of the City of Syracuse* may at any time continue and lay out Chestnut Street from its present southern terminus upon and across the premises above described," etc. Here was an agreement by the defendant that the proper authorities might lay out a public street. The language does not create in my mind the conclusion that the defendant thereby agreed to any private right of way to Mrs. Raynor and her successors, or to any special right in their behalf, to have a street or passage-way outside of one which the city might decide to lay out. The clause does not guarantee to Mrs. Raynor a right of way or a special right to have a street. It guarantees that the city shall have the right to lay out a street when it sees fit, and leaves Mrs. Raynor to take her chances upon the city so laying out such street. In like manner, the deed to which this contract led, and in which it became merged, conveys, "subject, however, to Chestnut Street through said premises *as a public highway* heretofore laid out and conveyed or dedicated as such highway by said party of the first part." This clause likewise seems to me to embody the same idea that defendant took its lands subject to a public highway and subject only to a public highway in case it was maintained as such. The defendant is entitled to a reasonable construction of the language used. It might very well be willing to consent that the city should maintain a street across its lands, believing that it, as well as its grantor, would derive benefits from such a street. But a very different burden would be imposed upon the premises if it should be held that it had taken subject to a reservation in favor of its grantor to have a right of way over a strip of land sixty-six feet wide through the center of its lands, even though the city declined to lay out and maintain, in proper condition for public travel, such street.

I reach the conclusion, therefore, upon this point, that the plaintiffs' grantor, by her contract and deed with the defendant, limited her rights to the opening and maintenance of a public street by the city of Syracuse through the premises in question, and did not reserve or secure to herself any other rights or privileges; that the limit of defendant's obligation was to allow the

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city of Syracuse to construct and maintain Chestnut street across its lands, and that when the latter failed and omitted so to do, its obligations ceased. Wheeler v. Clark, 58 N. Y. 267; Jackson v. Hathaway, 15 Johns. 447, 453; Kings Co. Fire Ins. Co. v. Stevens, 101 N. Y. 411.

It may be suggested that the contract between Mrs. Raynor and defendant provided that the city of Syracuse might "at any time" continue and lay out Chestnut street, and that, therefore, the six years' statute hereinbefore referred to would not apply. My opinion would be, in the first place, that this contract was merged and satisfied by the deeds to the University and to the city, and that these conveyances define and limit the rights of the parties.

In the second place, however, if this were not so, the provision "at any time" would be construed to mean a reasonable time, which has long since elapsed.

If the conclusions which I have reached as to the nature and loss of the rights originally acquired by the city of Syracuse and plaintiffs' grantor, to have Chestnut street maintained across the lands conveyed by Mrs. Raynor to defendant, are correct, they lead to the still further conclusion that the plaintiffs cannot recover in this action.

If, however, it should be assumed that the right still exists in favor of plaintiffs to have a street maintained upon and across the premises so conveyed to the defendant by Mrs. Raynor upon the lines originally indicated, I am led to the consideration of the third and last question suggested at the beginning, whether the right to have said street so continued at said point would be of any such use or value to plaintiffs that the encroachment upon its line by defendant's building in question causes an injury to plaintiffs, so special and important in its nature, that a court of equity will compel the abatement and removal of said building. The answer to this question involves the consideration of the conditions surrounding said strip of proposed street, and a statement and consideration of facts some of which have not as yet been referred to.

It is claimed by defendant that said section of the street, if opened, would start from plaintiffs' premises upon the south and be blocked and terminated at the southerly line of lot 201, thus leading nowhere and being of no use or value to plaintiffs.

Chestnut street, as projected upon the altered lines fixed at

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about the time of the conveyance to the defendant hereinbefore referred to, extended from a street bounding the premises of defendant upon the north, and now known as University Place, through to Oakwood Cemetery, which bounds upon the south the premises then owned by plaintiffs' grantor, and now owned by them. The section of the proposed street across the premises granted to the defendant by Mrs. Raynor was bounded on the north by the southerly line of farm lot 201, and upon the south by the center line of a proposed street running nearly at right angles with it, to be known as Croton street, and the premises retained by Mrs. Raynor, and now owned by these plaintiffs, were and are bounded upon the north by said center line of Croton street. As heretofore stated, Croton street has never been opened to or used by the public for travel. There is no entrance from Chestnut street through or into Oakwood, so that it is blocked at that end. Plaintiffs do not own any land abutting upon either side of the section of Chestnut street under consideration, but their premises lie at the southerly end of said section. The premises upon both sides thereof are owned by the defendant, and, so far as appears, are largely open and unoccupied by buildings, except the one complained of. Said building is a long distance from the premises now owned by plaintiffs. Said latter premises have an outlet upon a street running upon the westerly side thereof, if not upon one extending along the easterly side thereof. University Place, bounding defendant's lands upon the north, is a street which has been accepted by the city, and is used for public travel. The situation of the land included within the proposed lines of Chestnut street, between said University Place and the section of Chestnut street covered by Mrs. Raynor's deed, and of the abutting lands, is as follows:

The lines of the proposed new or altered Chestnut street nearly coincided with the lines of the old Chestnut street at what is now the northerly line of University Place, and from that point curved and deflected towards the east as they were continued across the premises conveyed by Mrs. Raynor. Short and Sperry conveyed to the defendant lands lying upon the westerly side of and extending to the center of *old* Chestnut street, between University Place and the southerly line of lot 201. One Smith conveyed to defendant lands lying upon the easterly side of and extending to the easterly line of the proposed *new* Chestnut street.

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He also conveyed to said defendant the triangle of land bounded by the southerly line of farm lot 201 and the center lines, respectively, of the old and new proposed Chestnut street. The land lying between the easterly and center lines of the new Chestnut street he conveyed to the city of Syracuse, except that his title did not cover a small strip of said lands upon the westerly side thereof at the northerly line of University Place. These conveyances were all executed at about the same time as Mrs. Raynor's to the defendant.

There is nothing in the deed from Short and Sperry to the defendant, or in the contract for the sale of the lands covered thereby, which, as I understand it, is claimed to impose upon the defendant any obligation to keep open the new Chestnut street. The agreement between Smith and the defendant called upon the latter to open Chestnut street *south* of farm lot 201, but neither said contract nor the deed executed in pursuance of it imposed upon defendant any obligation as to Chestnut street north of farm lot 201, outside of the fact that the descriptions referred to said street. The deed from Smith to the city of Syracuse of the easterly half of Chestnut street was executed and delivered sometime prior to December 14, 1870, and it recites a conveyance of the land in question "so long as the same shall be used as a public highway or street and upon the express condition that said street shall be laid out and opened to the public on or before May 1, 1871." And also that said party of the second part is "to have and to hold the said premises so long as the same shall be used as a public highway or street." As a matter of fact, the city of Syracuse has never entered upon, opened up or worked said street, and the same has never been used by the public as a highway. The claim was made by plaintiffs, upon the trial, that at one time, under a franchise granted by the city, a street railway extended its line through part of said section of said street. This claim, however, was disputed, and I do not think that the plaintiffs have produced such a preponderance of evidence upon that question as entitles me to find said fact established. There has been a roadway leading from University Place southerly over a strip of this proposed street, but that has been a private way maintained by and under the control of the defendant.

We thus have it that of the lands over which Chestnut street would have to be continued from the southerly line of farm lot

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201, where the Raynor section terminates, one-half is owned by the defendant and the other half is covered by a deed to the city which contained express provisions and conditions that it should be used for a street within a certain time, and with which conditions and provisions the city has failed to comply for thirty years. Mrs. Raynor, as I have before stated, was in no way a party to the contracts and deeds between Short and others, and Smith and the defendant and the city of Syracuse, relating to this northerly portion of Chestnut street. So far as I can perceive, she has no right to compel defendant to open up and dedicate the westerly half of said section of Chestnut street, and I see no way in which she can control as between Mr. Smith and the city of Syracuse the right to use the easterly half, which has unquestionably been forfeited by the city at the election of Mr. Smith. It, at least, can be said, without any dispute of fact, that upon this trial there has not developed any probability of the street being opened up and continued through farm lot 201 to the nearest public highway — University Place. In addition to the conditions already mentioned, the defendant, many years since, erected one of its buildings within the lines of Chestnut street upon said farm lot. It is well settled that, in order to secure relief such as is sought by plaintiffs in this case, abating an obstruction in the highway, the plaintiffs must establish, *first*, that they are suffering special damages from it, and, *secondly*, that the injury resulting therefrom is of a substantial nature, and one for which adequate compensation cannot be made in the way of money damages. The two grounds upon which relief is secured in such a case as this ordinarily are that the alleged nuisance obstructs the light and air of the complainant, and also obstructs and interferes with his passage over the highway in question to and from his premises. It would be the merest fiction in this case to hold that the building erected by defendant obstructs plaintiffs' light or air. The country is substantially open in the locality in question, and the building is a long distance from plaintiffs' land. No adequate reason for removing the building upon this ground is established. Adler v. Metropolitan El. R. Co., 138 N. Y. 173, 180.

Neither does the building impair any substantial or beneficial right of the plaintiffs by obstructing any passage over the street which would be useful or beneficial to them. They have no abutting lands, ingress to and egress from which is stopped. They

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could not pass through this portion of the street, if open, to any other highway or desirable point, because of the condition existing between this section of Chestnut street and University Place already commented upon. Absolutely free and unobstructed right of passage would simply give them the privilege of passing to and over a *cul de sac* extending from their premises upon the south to farm lot 201 upon the north, with no point or thing between which they have any occasion to go to. Under these circumstances they are not entitled to recover the relief demanded.

In Adler v. Metropolitan El. R. Co., *supra*, page 180, the rule is quoted by Judge Andrews as elementary "that a private individual cannot maintain an action to abate a public nuisance unless he is specially injured, nor will the court exert its equitable power of injunction in a case of a violation of a mere abstract right, unaccompanied with any substantial injury, present or apprehended."

In Wakeman v. Wilbur, 147 N. Y. 657, 663, the court lays down the rule that, while a person who sustains a private and peculiar injury from the obstruction of a public highway may bring an action to abate the nuisance, the injury must be special and not merely nominal.

In Prince v. McCoy, 40 Iowa, 533, substantially the same question here under discussion was decided adversely to the plaintiff. He had brought an action to restrain the defendant from obstructing or inclosing a public street. The defendant, in answer to the petition, amongst other things, alleged that the streets in question in their then condition were not susceptible to use as such, and had not theretofore been used, and that, therefore, plaintiff would in no manner be injured in the free use and enjoyment of his property by their inclosure. The plaintiff's demurrer to this answer was overruled, the court holding that if the streets had not been and could not be used for the purpose of their dedication, it was impossible to see in what respect plaintiff could be injured.

See, also, to same effect, in case of criminal proceedings, State of Iowa v. Shinkle, 40 Iowa, 131.

In Zabriskie v. Jersey City & B. R. Co., 13 N. J. Eq. 314, it was held that the court of equity would not abate what was alleged to be an obstruction in the highway where, under condi-

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tions as they existed at the time of suit brought, such obstruction could cause no real or substantial injury to the complainant.

In order that a plaintiff may succeed in an action of this kind he must show that he has suffered, or will suffer, substantial injury, for which he would be entitled to recover damages at law. A court of equity will intervene when the injury complained of is undeniably a nuisance and irreparable injury will ensue. Richeson v. Richeson, 8 Ill. App. 204. See, also, for general principles applicable to an action of this kind, Callanan v. Gilman, 107 N. Y. 360; Buchholz v. N. Y., L. E. & W. R. R. Co., 148 id. 640.

In accordance with these views, findings and judgment may be prepared, dismissing plaintiffs' complaint, with costs.

Complaint dismissed, with costs.

JACOB M. MARSHALL et al., Plaintiffs, *v.* CHARLES M. FRIEND, as Receiver of THE D. J. HAMBURGER & SONS CO., Defendant.

(Supreme Court, Onondaga Special Term, May, 1901.)

Pleading — Counterclaim — Code C. P., § 501, subd. 1.

Where vendors bring replevin against the receiver of an insolvent firm of vendees in order to retake certain goods alleged to have been obtained of the vendors by the firm through fraud and to have come into the hands of the receiver, a counterclaim alleging that the sheriff did not seize the goods described in the requisition to him, but took a distinct lot of goods which never belonged to the vendors and which they were not entitled to take at all, is demurrable, as the counterclaim does not arise out of the contract or transaction set forth in the complaint and is not connected with the subject of the action.

DEMURRER by plaintiffs to counterclaim set forth in defendant's answer, upon the ground especially, amongst others stated, that said counterclaim is not of a character permissible in this action.

Benjamin Stolz, for demurrer.

P. E. Du Bois, opposed.

HISCOCK, J. This action is one of replevin, brought to recover a large number of wool pelts, the wool taken therefrom and the skins thereof, otherwise known as slots, in pickle or lime, and the sheriff of Albany county, under the process and requisition delivered to him, has taken from the possession of defendant a large

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number of such wool pelts, etc. The action is based upon a complaint by plaintiffs, that they and their assignor were induced to deliver the property sought by them in this action to the D. J. Hamburger & Sons Company by fraud; that it came into the possession of defendant as receiver of said company; that they have elected to rescind the purchase and are entitled to retake the property. The answer, by its denials of allegations in plaintiffs' complaint, raises various issues. It then sets forth, by way of the counterclaim which is under consideration herein, in substance, that the identity of the pelts, etc., sold by plaintiffs and their assignor to the Hamburger & Sons Company had been lost before this action was started, and that, as matter of fact, the property taken by the sheriff herein, under the requisition to him, was not the property sold by said plaintiffs and assignor to the Hamburger & Sons Company, but was entirely different and other property which did not come from them, and upon such allegations said answer seeks relief in the way of the return of said property, damages, etc.

The proposition especially urged by plaintiffs, as above stated, is that such counterclaim is not one which can be set forth and urged in this action, and with such contention I am led by consideration to agree.

The question is to be settled by reference to the familiar provisions of section 501, Code, which provide that the counterclaim allowed to be set up in the answer "must be one of the following causes of action against the plaintiff. * * * A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's complaint or connected with the subject of the action."

The difficulty in this case, as generally, arises in the application of the words in question to the particular facts in hand. There is no doubt but that, as claimed by defendant's counsel, a counterclaim for tort may be set forth in response to a complaint upon contract, and *vice versa*. The especial thing is that the counterclaim shall come within the requirements of this section of the Code in either arising out of the contract or transaction set forth in the complaint, as the foundation of plaintiffs' claim, or be connected with the subject of the action. I think that a short analysis of the facts appearing upon this argument will show that the counterclaim attempted to be set forth by the defendant here does not come within either branch of such requirements.

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The defendant's counterclaim is based upon the claim and allegation, in substance, that the sheriff did not seize the goods described in the requisition delivered to him in behalf of plaintiffs, and which goods alone he was entitled to take, but that, upon the contrary, he took an entirely different and distinct lot of goods which never belonged to plaintiffs or their assignor, and which, within the allegations of their complaint, they were not entitled at all to take. Under the process delivered to him, the sheriff was entitled simply and only to take the chattels described in the affidavit delivered to him with the requisition, if found in the possession of the defendant or his agent. If he took property other than that described in the affidavit, or took it from a person other than the defendant or his agent, his process was no protection to him, and he was guilty of a trespass. Bullis v. Montgomery, 50 N. Y. 352, 356; Otis v. Williams, 70 id. 208.

He acted at his own peril in this respect, and if the affidavit did not sufficiently identify to him the property which plaintiffs were seeking in this action, and which he was entitled, under the process issued to him, to take, it is well settled that he had the right to refuse to act or to require proper indemnity.

We, therefore, have defendant charging, in effect, that the sheriff, acting in this action, was guilty of a trespass in taking goods which he was not entitled to take under the process delivered to him.

Now compare that cause of action set up, by way of counterclaim, with the contract or transaction set forth as the foundation of plaintiffs' claim, and with the subject of this action, and I think it must be manifest that it neither arises out of the one nor is connected with the other.

The cause of action set forth as the foundation of plaintiffs' complaint is that they were induced by fraud to part with the property described in the complaint, that it passed into the defendant's hands and that they were entitled to retake it after a demand, etc. Certainly, the acts complained of by defendant, by way of counterclaim, did not arise out of any contract or transaction set forth as the foundation of plaintiffs' claim. Nothing in the whole line of acts constituting plaintiffs' alleged cause of action, from the sale of their goods to the Hamburger & Sons Company down to the commencement of the action, produced or gave birth to the facts constituting the counterclaim. The later did not arise out of any of them. It arose, as claimed, out of an attempt to

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enforce a provisional remedy after plaintiffs had started their action, and, hence, after their cause of action had accrued and become perfect.

Neither is there any connection between said counterclaim and the subject of the action. The subject of the action is the pelts claimed by plaintiffs to belong to them, and to be wrongfully withheld by the defendant. Carpenter v. Manhattan Life Ins. Co., 93 N. Y. 552.

They, by their complaint, distinguish those pelts as a certain lot which had been sold by them to the insolvent corporation, and which subsequently had passed into the possession of the defendant as receiver. Those are the only chattels which they cover by their complaint, and which they are entitled to recover, if at all. The entire counterclaim and complaint of the defendant rests upon the allegation that the sheriff in this action has not taken the pelts constituting such subject of the action, but has taken an entirely different and distinct lot, which plaintiffs never owned, and are not entitled to recover. He rests distinctly and affirmatively upon the proposition that the two lots of property are entirely distinct, and are not in any manner whatever related or connected with each other. That is the very basis of his counterclaim.

While the facts involved in Bernheimer v. Hartmayer, 50 App. Div. 316, 319, are somewhat different from those here involved, that case, nevertheless, seems to go far enough to be an authority in favor of plaintiffs' contention and demurrer.

The conclusions which I reach upon this ground, urged against the demurrer, renders it unnecessary for me to consider, under the further ground of demurrer, that the alleged counterclaim does not set forth sufficient grounds to constitute a cause of action, whether defendant could have relief against plaintiffs for alleged misconduct of the sheriff in taking goods which he was not required or authorized to do, without alleging and proving that the plaintiffs in some manner directed and authorized such illegal act.

The demurrer is, therefore sustained, with twenty dollars costs and disbursements, and the ordinary decision and interlocutory judgment may be prepared.

Demurrer sustained, with twenty dollars costs.

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JAMES J. KENNEDY, Plaintiff, *v.* BLANCHE M. STEELE, Individually and as Administratrix, Etc., of the Estate of HERBERT A. STEELE, Deceased, and FRANK Z. WILCOX, Defendants.

(Supreme Court, Onondaga Special Term, May, 1901.)

Attorney — Equitable lien as against an administratrix.

An agreement by which an attorney contracts with an administratrix to act as her counsel in the prosecution of pending actions to recover insurance upon the life of her husband and intestate — the only asset of his estate — and that he shall have a certain portion of the recovery, if successful, and nothing in case of defeat, gives him a lien upon the fund, and where, after recovery, his compensation is set apart in the hands of a third person, he may enforce his lien by an action in equity against the third person and the administratrix without having the claim allowed by the proper surrogate on her final accounting.

DEMURRERS to complaint.

William Kennedy, for plaintiff.

Frank Z. Wilcox, for defendants.

HISCOCK, J. Separate demurrers have been served by each of the defendants to plaintiff's complaint upon the grounds:

(1) That it appears upon the face of the complaint that the Supreme Court has not jurisdiction of the subject of the action.

(2) That it appears upon the face of the complaint in this action that the said complaint does not state facts sufficient to constitute a cause of action.

Plaintiff's complaint alleges, in substance, that on October 19, 1897, the defendant Blanche M. Steele was the administratrix of the estate of Herbert A. Steele, her husband, and that on that day there was pending and undetermined in the Supreme Court an action brought by her as such administratrix to recover upon two policies of insurance executed upon the life of her said husband; that on said day she retained plaintiff's assignor, one William Kennedy, to act as counsel in the prosecution of said action, "agreeing upon his (her) part that the sum of $250 of the proceeds recovered in said action should belong to the said Kennedy

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for his services as counsel in the action, the same to be paid to him by said Blanche M. Steele out of the proceeds of any recovery in the action when the same should come to her hands, and in case no recovery was had then he was to receive no compensation for his said services"; that said Kennedy fully performed his part of the contract with the said Steele, and so successfully aided and assisted the plaintiff as counsel that finally thereafter, through the decision of the Court of Appeals, a judgment was obtained in her favor for the sum of over $5,000, the amount and proceeds of which duly came into her hands; that instead of paying therefrom to said Kennedy said sum of $250, she has refused to do the same, but has placed said amount in the hands of the defendant Wilcox as a pretended trustee for said Kennedy. And said complaint further alleges that said Steele and said Wilcox, acting in concert, are capriciously and unreasonably refusing to pay over said amount to said Kennedy, upon the ground and pretext that his claim must be passed upon by the Surrogate's Court, and that, in the meantime, said Steele is delaying her accounting and is dissipating the estate; that said Steele and said Wilcox are, both of them, financially irresponsible. It is also further alleged and appears from said complaint that the said $250 was, by Mr. Sargent, the attorney of record in said litigation, at the request of the defendant Steele, paid over to the defendant Wilcox for the benefit of Mr. Kennedy, said Wilcox and said Steele, between themselves, executing a memorandum of that fact, but attaching, as a condition to the payment by Wilcox to Kennedy of said $250, that his claim should be allowed upon a final accounting of the estate in the Surrogate's Court of Onondaga county. It also appears, in addition to the other allegations of the complaint hereinbefore referred to, that said Steele executed a written paper, which provided for the payment of said $250 to said Kennedy out of the proceeds of said litigation, and provided that, in case there was no recovery, no allowance should be made to him. The complaint also sets up the necessary assignment to plaintiff, and asks judgment establishing a lien upon said sum of $250, and directing its payment over to plaintiff.

As appears by the recital of the grounds set forth in their respective demurrers, the defendants' claim in this action is that the plaintiff has no right to the sum of $250 until allowed by a final decree in the Surrogate's Court; that the defendant Steele

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did not have the right or power to make Mr. Kennedy's compensation a charge upon the assets of the estate which she represented, and that he has no claim against said estate, but that his claim is against said Steele individually. If this was an ordinary action at law, defendants' reasoning might be well laid, but such is not the case. This is an equitable action to establish a lien upon and right to a separate fund, which is concededly in the hands of the defendant Wilcox for the benefit of this plaintiff, as assignee of Mr. Kennedy. The only question is whether Mrs. Steele could give plaintiff's assignor a lien upon or right to part of the proceeds of the litigation which he was helping to prosecute for her benefit. I think this question, however, has been fully settled in plaintiff's favor. It does not appear that the estate represented by Mrs. Steele had any other assets than the litigation in which Mr. Kennedy was engaged. That, under those circumstances, she had a right to give him a claim upon part of the proceeds of that litigation for his compensation, if successful, and, at the same time, to exempt herself individually and the estate from any charge if the litigation was unsuccessful, I regard as well established by the following authorities: Randall v. Dusenbury, 39 N. Y. Super. Ct. 174; affd., 63 N. Y. 645; Noyes v. Blakeman, 6 id. 567; New v. Nicoll, 73 id. 127; Harwood v. La Grange, 137 id. 538; Matter of Knapp, 85 id. 284.

The demurrer served separately by each defendant is overruled, with costs to be taxed from the time the demurrer was served, at the same rate as in an action at law.

The usual interlocutory judgment may be entered also, giving defendants the right, within ten days after payment of such costs, to serve an amended pleading, if so advised.

Ordered accordingly.

Matter of the Estate of Dolge & Son.

Matter of the Claim of Julius Breckwoldt.

(Supreme Court. Onondaga Special Term, May, 1901.)

Receiver — Preference against by lien.

Where a creditor of an insolvent firm fails to show that any of the proceeds of a renewal note, which he forwarded to the firm shortly before its failure to take up other notes of his and which renewal

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note the firm had discounted, ever came into the hands of the receiver of the firm, the creditor cannot claim a specific lien upon the assets as against the receiver since he is merely a general creditor.

MOTION by the receiver of the above estate to confirm a referee's report, and to have it determined that the claimant is only an unpreferred creditor for the sum of $1,772.14, instead of a person having a lien upon the assets in the hands of the receiver, as it is alleged by said claimant that he should have.

Kernan Brothers & Quinn, for motion.

Charles J. Palmer, opposed.

HISCOCK, J. Some of the material facts which appeared upon the trial of this claim are as follows:

Dolge & Son held notes against the claimant in March, 1898, amounting to upwards of $2,700. Upon March 22, 1898, he mailed to the firm his note for $1,806.17, with which to provide for the payment of so much of said two notes, maturing in April, 1898, as he intended not to pay. The firm mailed a package of notes to its broker, one Waters, in Buffalo, who sold a portion of them, including the plaintiff's note, for $4,652.35, receiving a draft for that amount. He sent to Dolge & Son a draft for $4,000, and the balance, $652.35, in cash, he deposited to his credit in the Citizens' Bank of Buffalo. This took place on or about April 6, 1898. April 11, 1898, Mr. Mills, the receiver of said Dolge & Son, which was a copartnership, was appointed.

I regard it as established as found by the referee that no part of said $4,000 proceeds of said notes mailed to the firm as aforesaid came into the hands of the receiver. Upon April 19, 1898, Waters purchased a draft for $628.54, the balance of the proceeds of the above-mentioned notes received by him, less $23.81, expenses, etc., which he mailed to the firm of Dolge & Son at its old office address. Said draft has never been received by Mr. Mills, as receiver, or, so far as can be discovered, by anyone else who was entitled to it, and has never been paid or presented for payment. And said balance has never been paid over to the receiver, and, so far as appears, still remains in the hands of Mr. Waters, subject to said outstanding draft.

Under these circumstances I think that the report of the referee must be confirmed, so far as it holds that the claimant has no

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specific or special claim or lien upon the assets in the hands of the receiver as against other creditors. None of the proceeds of the batch of notes discounted, as aforesaid, and which included claimant's, has come into his hands. Four thousand dollars thereof was spent and is accounted for before his receivership, and, while he is or may be entitled to collect said balance of $628.54, he has not done so and has not got that sum in his hands.

I have no doubt, however, that the note received by Dolge & Son from the claimant was received by them for the purpose of in part retiring the old notes so held by them, and for that specific purpose, and so far as the proceeds of the new note were applied to other purposes it was a diversion, intentional or otherwise, and that, claimant having been compelled to pay the old notes, has a claim upon the proceeds of the lot of notes discounted, including his still in the hands of Mr. Waters. The latter is not a party to this proceeding and relief against him must be sought in other ways. Importers & Traders' Nat. Bank v. Peters, 123 N. Y. 272.

Ordered accordingly.

DORR RAYMOND COBB, as Assignee, etc., of the Central City Building and Loan Association, Plaintiff, *v.* CHARLES R. JOHNSON, Defendant.

(Supreme Court, Onondaga Special Term, May, 1901.)

Consideration — Void promise of building association to release a shareholder.

An agreement, made by a building and loan association with the maker of a note held by it and accompanied by a pledge of his shares not fully paid, under which it agrees to cancel the note and relieve him from personal responsibility thereon by charging the note up against the amount payable upon his stock, which had been filed by him for withdrawal, when shown to have been made at a time when the association had no funds to pay the withdrawal value and when there were many other similar applications entitled to prior consideration and payment, is without consideration; if enforcible, would constitute a fraudulent preference and, therefore, presents no defense to an action on the note brought by an assignee of the association.

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ACTION to recover upon a note made by defendant.

E. N. Wilson, for plaintiff.

Hiscock, Doheny, Williams & Cowie, for defendant.

HISCOCK, J. Defendant gave to the plaintiff's assignor April 9, 1896, his note for $300. Prior to that time he had become the owner of ten shares of the installment stock of said association of the par value of $100 each, upon the purchase price of which he had paid $460, and at said date he pledged said stock with said association as collateral for the payment of that note. He has paid upon the note the interest and premium to July 9, 1897, and in addition to that, $80.99 of the principal. The only defense urged to the action upon the note is that by certain correspondence had between him and the association through its secretary in the latter part of 1897, said note was paid and canceled under and by virtue of an arrangement and agreement by which it was to be charged up against the amount to be paid to him upon his stock which had been filed with the association for withdrawal. At that time there were between 150 and 160 other applications for withdrawal of stock filed with the association which were entitled to consideration and payment before his, and as a matter of fact at the time of said alleged agreement of payment and cancellation there were not any funds on hand with the association for the payment of the withdrawal value of his stock, and there never were afterwards.

Construing the correspondence under which defendant seeks to establish a payment and cancellation of his note in the light of all these circumstances, I think the defense must fail. The last letter written by the secretary of the association to defendant and upon which he especially bases his defense, was, in effect, that the association would not charge him anything upon his note after September first of that year, but would charge it up against the withdrawal value to be paid upon his stock and would relieve him from any personal liability.

As stated, and as it must be assumed was known by the officers of said association when they made said purported arrangement, there were no funds on hand applicable to the payment of the withdrawal valuation of his stock and there never were after-

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wards. The purported agreement therefore amounted to a promise and agreement upon the part of the association in effect to cancel defendant's note and relieve him from personal liability without any payment or consideration whatever, and there was no consideration for the agreement relieving him from personal liability.

The agreement, if it were enforceable, would be a clear fraud upon the rights of the other stockholders and creditors of the association. Under the rules and regulations governing the organization and conduct of the association it was clearly provided and understood that withdrawals were to be disposed of and paid in the order in which they were filed. If the agreement can be enforced as claimed by defendant, it would amount to giving him a clear preference in point of time, as well as otherwise, over 150 other stockholders who had filed prior claims for withdrawal.

Judgment is ordered for plaintiff, with costs.

Judgment for plaintiff, with costs.

ALICE FIELD, as Administratrix, etc., Plaintiff, *v.* The NEW YORK CENTRAL AND HUDSON RIVER RAILROAD Co., Defendant.

(Supreme Court, Onondaga Special Term, May, 1901.)

Negligence — Bill of particulars — Affidavit.

Where the defendant, in an action for negligence based on a collision of its freight trains, seeks by a bill of particulars to discover the persons intended by the plaintiff's allegations that the defendant wrongfully and negligently failed to provide one of its servants with competent temperate co-employees and with a sufficient number to handle its train and cars, the plaintiff must furnish the defendant with the names and positions of those employees whose competency it is proposed to attack.

An attorney for a corporation may make an affidavit as to the necessity for a bill of particulars where he gives a sufficient reason why an officer of the corporation did not make it.

MOTION to compel plaintiff to furnish defendant with a bill of particulars setting forth the particular respects in which defendant is claimed to have been negligent.

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A. H. Cowie, for motion.

W. S. Jenney, opposed.

HISCOCK, J. This action is brought to recover damages for the death of plaintiff's intestate, alleged to have been caused through the negligence of defendant. Several grounds of negligence are alleged. Upon the argument of the motion an agreement was reached between the counsel as to what should be done in the way of serving a bill of items of the alleged negligence of the defendant in all respects save one. The accident was caused by a rear end collision of one freight train with another. Amongst other things, it is alleged that the defendant "wrongfully and negligently failed to provide said Field with competent temperate coemployees and with a sufficient number to handle its train and cars." A large number of employees must necessarily have been engaged in the operation of the trains and tracks which were involved in this accident. It requires a large amount of investigation and very often a large number of witnesses to enable a defendant to be prepared to defend the character of an employee. I think it would be too burdensome to require this defendant to institute such investigation and make such preparation in the case of a large number of employees as it would be forced to do, unless some previous indication was given of the particular ones who were to be subjected to criticism by the plaintiff, and that, therefore, it is proper that plaintiff should furnish defendant with the necessary particulars, indicating by name or by the positions which they held at the time of the accident the employees whose competency she proposes to question upon the trial of the case.

It was suggested upon the argument that the affidavit by one of the defendant's attorneys as to the necessity for a bill of particulars was not sufficient, but that such affidavit should have been made by one of the officers of the defendant. I think, however, that the affidavit furnished was sufficient and gives sufficient reasons for its being made by the attorney rather than some other officer of the defendant.

Ordered accordingly.

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LEWIS P. SMITH, Trustee in Bankruptcy of ALVIN J. BELDEN et al., Plaintiffs, *v.* ALVIN J. BELDEN et al., Defendants.

(Supreme Court, Onondaga Special Term, May, 1901.)

Bankruptcy — Parties to action by trustee to reach the surplus of a trust fund.

A judgment creditor of a bankrupt is not a necessary party to an action by the trustee to reach the surplus, as it accrues, of the income of a trust fund created for the bankrupt's benefit, in the absence of any allegations that the trustee is not proceeding with good faith and diligence; and even where the creditor claims that he has a lien on the surplus and that the trustee has none, he will not permitted to become a party as he will not be bound or injured by the judgment rendered.

ONE Brown, claiming to be in the position of a judgment creditor of the defendant Belden, applies, under section 452, Code, to be joined as a party defendant in this action which is brought by plaintiff, as trustee in bankruptcy of said Belden, to reach an alleged surplus as it accrues in the income of a trust fund created for his benefit under the will of his father.

George D. Chapman, for application.

Mackenzie & Wade, for plaintiff, opposed.

W. P. Goodelle, and Fowler & Crouch, for defendants, opposed.

HISCOCK, J. The application is denied for the following reasons: If, as claimed by the present parties to this action and as held in Matter of Baudouine, 3 Am. Bank. Reg. 55, the plaintiff has become vested with the right to reach any surplus in the income of the trust fund in question, the petitioner has no legal title to or interest in the subject-matter of this suit and is not in any way a necessary party to its prosecution or determination. His only interest is that of a general creditor in the successful prosecution of the action and in the disposition of its fruits. It

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is settled that on account of such interest he should not be made a party in the absence, as is the case upon this motion, of any allegations touching the good faith and diligence of the trustee for the creditors. Davies v. Fish, 47 Hun, 314.

Even if it should be held that this court had the power to order petitioner to be made a party, I do not think it should be done in this case until there is some indication of negligence or bad faith upon the part of plaintiff.

If petitioner is right in his claim that he has acquired a lien upon any surplus which may arise in the income of the trust fund, and that the plaintiff upon the other hand has not acquired any right thereto, I still do not see that it is necessary to grant this motion. Petitioner is not a party to, and cannot be, bound or injured by any judgment in this action. It is not necessary that he should be brought in here to protect his interests and claims if they are as he asserts them to be. White's Bank of Buffalo v. Farthing, 101 N. Y. 344, 348.

The motion is, therefore, denied, with ten dollars costs.

Motion denied, with ten dollars costs.

WILLIAM YOUNG et al., Administrators, etc., Plaintiffs, *v.* THE SYRACUSE, BINGHAMTON AND NEW YORK RAILROAD CO., Defendant.

(Supreme Court, Onondaga Special Term, May, 1901.)

Costs — Where non-suit is reversed and judgment absolute is given the plaintiffs in the Court of Appeals — Code C. P., §§ 3228, 3256.

Only one trial fee can be taxed by the plaintiffs where they are nonsuited on the trial, the decision reversed by the Appellate Division, the latter decision affirmed by the Court of Appeals and judgment absolute there given the plaintiffs on a stipulation to that effect. In such case a subsequent assessment of damages is not a trial, but clerks', jurors' and witnesses' fees are taxable thereon.

THIS action was brought to recover damages for the alleged negligence of defendant, resulting in the death of plaintiffs' intestate. The plaintiffs were nonsuited at the Trial Term, which

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decision was reversed by the Appellate Division. Defendant then appealed from the judgment entered upon the latter decision to the Court of Appeals, giving a stipulation for judgment absolute. The latter court affirmed the decision of the Appellate Division, ordering judgment absolute for plaintiffs, with costs. In accordance with such decision and judgment plaintiffs had an assessment of their damages at the Trial Term, being allowed $5,000. They have taxed as part of their costs in this action for and on account of such assessment of damages a trial fee and certain clerks', jurors' and witnesses' fees. This motion is made by defendant for a retaxation and disallowance of all of said items.

W. S. Jenney, for motion.

George W. O'Brien and L. P. Lang, opposed.

HISCOCK, J. The trial fee of thirty dollars must be disallowed. There has been only one trial of the action and for that plaintiffs, without objection, have been allowed to tax a trial fee. The assessment of damages is not a trial, or, as claimed, an inquest so as to allow plaintiff to tax a trial fee. The other disbursements are allowed and the motion to disallow them denied. I have no doubt that their allowance is amply provided for by the provisions of sections 3228 and 3256, Code.

Ordered accordingly.

RUFUS C. GARDNER, Plaintiff, *v.* THE NEW YORK MUTUAL SAVINGS AND LOAN ASSOCIATION, Defendant.

(Supreme Court, Orange Trial Term, May, 1901.)

Estoppel — Amendment reducing the withdrawal value of shares in a mutual association.

A shareholder in a mutual savings and loan association who, knowing of an amendment to its articles which may have reduced the withdrawal value of his shares below their actual value, stands by for two years and without protest sees other members pay their dues on the new basis, cannot, nor can his assignee, afterwards claim against the association, upon withdrawal therefrom, any greater sum than the amendment entitled him to.

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THE plaintiff was the owner of certain installment shares in the defendant. Subsequently to the issue of the plaintiff's shares the defendant's articles of association were amended by reducing the withdrawal value of shares. The amendment was regularly made though plaintiff did not have actual notice of it. Nearly three years after the amendment the plaintiff served notice of withdrawal and the defendant then paid him the amount due him pursuant to the amended articles. The plaintiff now sues to recover the balance of the amount he would have been entitled to under the articles as they existed at the time his shares were issued.

Gantz, Neier & McKennell, for plaintiff.

Russell & Winslow (John E. Ruston, of counsel), for defendant.

MAREAN, J. The articles of association, at the date of issuing of shares to plaintiff's assignor, provided that withdrawing members should receive the amounts paid by them for dues, with six per cent. interest, less a withdrawal fee of one dollar per share. Subsequently the articles were amended so as to provide that they should receive the amount paid for dues, with the profits credited to the shares, less the amount set aside therefrom to the reserve fund.

The amount set aside to the reserve fund has always included one per cent. per annum on the maturity value of shares, although prior to the amendment it was not deducted in ascertaining withdrawal value. The amendment, so far as it substituted declared profits for interest, was in the present case in favor of the withdrawing shareholder, and the question is solely whether the one per cent. per annum on the maturity value of shares (not the one dollar per share), which having been put to the reserve fund was under the amendment to be deducted instead of a withdrawal fee of one dollar per share, might lawfully be deducted by the defendant.

While I am disposed to conclude that the amendment, in so far as it may have reduced the withdrawal value of the shares in question below their actual value, taking all the assets, including the reserve fund, into account, was a violation of the rights of plaintiff's assignor if done without his consent, I think he was estopped at the time he gave notice of withdrawal to claim any

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larger sum than he was entitled to under the amendment. He is chargeable with knowledge of the amendment in favor of other shareholders, some of whom have no doubt become members since then, and he could not stand by in silence and without protest see other members paying dues for more than two years, on the faith of the amendment which cut down the withdrawal value of his shares, and afterwards claim as against them any greater sum on withdrawal than he was entitled to under the amendment.

The defendant represents the equities of other members and the estoppel is available to it.

Judgment for defendant, with costs.

THE PEOPLE ex rel. JAMES H. MORRISEY, Relator, *v.* JOSEPH B. BOLAND, Respondent.

(Supreme Court, Rensselaer Trial Term, May, 1901.)

Troy — Status of department of public instruction — Mayor's power of removal — L. 1898, ch. 182, §§ 49, 482.

The department of public instruction in the city of Troy is governed by chapter 80 of the Laws of 1892, under which it was organized and by the provisions of the city charter except where those statutes are inconsistent with the charter for cities of the second class.

The mayor of Troy has power, under the latter charter (L. 1898, ch. 182, § 49), to remove at pleasure a school commissioner, made by the city charter a city officer, and the provisions of the city charter giving the power of removal to the common council are repealed because inconsistent with the power of removal given the mayor by the charter for cities of the second class.

ACTION to determine the title to the office of school commissioner in the city of Troy.

John C. Davies, Attorney-General, and Charles E. Patterson, for relator.

Thomas S. Fagan, for respondent.

CHESTER, J. This action is one to determine the title to the office of school commissioner in the city of Troy.

The relator was appointed to that office on the 8th day of

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March, 1899, by the then mayor of the city and he thereupon qualified and entered upon the duties of the office. On September 13, 1900, he was served with a notice from the present mayor that he was removed by him from such office. On the same day the mayor filed a written appointment of the defendant as school commissioner to fill the vacancy in the board of school commissioners for the unexpired term of the relator. Since that time the defendant has been in possession of the office and has been serving as a member of such board. The relator claims that the mayor had no lawful power to remove him and the only question presented for determination is whether he had such power. If he had not, the relator is still entitled to the office. If he had, the defendant has been lawfully appointed, and the complaint must be dismissed. The board of school commissioners of Troy was organized pursuant to chapter 80, Laws of 1892. That act provides in section 1, that "The public schools of the city of Troy shall be under the management and control of seven school commissioners, to be appointed by the mayor of said city, who shall be electors and residents of said city, and who together shall constitute a board of school commissioners." The second section provides that the persons appointed shall be divided into three classes by the mayor; two to hold office for one year, two for two years and three for three years from the second Tuesday of March after their appointment, and that "Upon the expiration of the respective terms of office of the persons so appointed, their successors shall be appointed in like manner for a term of three years, which shall be the term of office of school commissioner under this act. Whenever a vacancy shall arise in said board from any cause, the mayor of the city of Troy shall in like manner appoint a suitable person to fill such vacancy for the unexpired term of the person whom he is appointed to succeed." The act contains no provision with reference to the suspension or removal from office of the school commissioners. Under the charter of Troy (Laws of 1892, chap. 670, as amended by Laws of 1895, chap. 277, tit. II, § 1), the seven school commissioners were denominated as officers of the city and the mayor was given power by section 2 of that title to suspend them for misconduct in office or neglect of duty based upon written charges. The common council was given power by the same section to try the charges, and after notice and an oppor-

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tunity to be heard in his defense to remove the officer complained of from office. This in brief is a summary of the laws in reference to the appointment, suspension and removal of school commissioners in Troy in force at the time of the passage of the act known as the "White Act" (Laws of 1898, chap. 182), for the government of cities of the second class, which includes the city of Troy. Section 49 of that act is as follows: "Except as otherwise provided in this act, the mayor shall appoint all the city officers, and except as otherwise provided in this act or in the other laws of the state, he may remove at pleasure any city officer appointed by him." Article 7 of the act last mentioned related to the "department of public instruction" and provided in section 240 that "The department of public instruction shall continue as provided by law." The other sections of the article, except the last, contained general provisions as to the powers and duties of the commissioners, the control of the schools and the school property and the appointment of subordinate officers and teachers. The last section related to the tenure of office, and was as follows:

"§ 252. All officers, principals and teachers connected with the public schools when this act takes effect, shall remain and continue in their respective positions until their positions shall become vacant by death, resignation or by removal under the procedure hereinbefore set forth."

But the next year, by chapter 581, Laws of 1899, section 40, all of article 7 was repealed except section 240, which remains as above quoted. While this repeal included section 252, which recognized a power of removal of school officers, it did not repeal section 49, which authorized the mayor to remove at pleasure any city officer appointed by him. That section remains as enacted in 1898.

The "White Act" contained the following saving and repealing clauses:

"§ 482. All statutes of the state * * * so far as inconsistent with the provisions of this act are hereby repealed.

"§ 483. Nothing contained in this act shall be construed to repeal any statute of the state * * * not inconsistent with the provisions of this act and the same shall remain in full force and effect, when not inconsistent with the provisions of this act, to be construed and operated in harmony with the provisions of this act."

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It results from the legislation referred to that the department of public instruction in Troy is governed by chapter 80, Laws of 1892, and the provisions of the charter of Troy so far as the same are applicable, except where those statutes are inconsistent with the provisions of the "White Act," and where they are inconsistent with that they are repealed and the provisions of the latter act control.

The provisions of the charter of Troy gave the mayor no power to remove, but only the power to suspend a school commissioner. The power of removal was there committed to the common council. The provisions giving the power of suspension to the mayor and of removal to the common council are inconsistent with the provision of the "White Act," giving power to the mayor to remove at pleasure, and are, therefore, repealed.

The relator contends that the intent of the Legislature in passing the "White Act" and in including therein the provision (§ 240) that "the department of public instruction shall continue as provided by law" was that the board of school commissioners shall continue organized, appointed and held in office, according to the provisions of law creating the department, and that the commissioners having been appointed under the authority of chapter 80, Laws of 1892, their tenure of office for the term of three years is fixed and protected by the provision to that effect in that law.

It cannot be intended by this to insist that nothing in the "White Act" was intended to or did affect the department of public instruction, for that conclusion gives no force to several provisions of that act which have effected important changes in the powers of the school board, and to support the contention of the relator it seems to me is to also ignore the effect of the repeal by that act of statutes inconsistent with it.

That such changes have been effected is shown by the recent case of People ex rel. Gaffigan v. Rickerson, 56 App. Div. 588, where it was held that the provision of subdivision 5, section 11, chapter 80, Laws of 1892, that "the said board of school commissioners shall * * * have the custody and safe keeping of the schoolhouses, outhouses, books and furniture," was repealed by the provisions of the "White Act" that the city engineer "shall act as the superintendent of public buildings" and "shall employ such subordinates to serve during his pleasure, and shall

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have such other assistance as the board of estimate and apportionment shall prescribe," and, therefore, that the school board no longer had authority to appoint janitors of school buildings.

Numerous other provisions of the later law are inconsistent with those of the former. For instance, under chapter 80, Laws of 1892 (§ 11), it was the duty of the school board, and they had the power, to fix and pay the salaries of teachers, of the clerk and of the superintendent of schools, while under the "White Act" (§ 98) it is made the duty of the board of estimate and apportionment to fix the salaries or compensation of all city officers and employees, except those who serve without compensation.

So under the former law (§ 11) the school board had the power and it was their duty to alter, improve and repair schoolhouses and appurtenances and to purchase, exchange, improve and repair school apparatus and furniture and provide books for indigent pupils, while under the later act (§ 120) there is created a board of contract and supply, which are charged with the duty, after public notice, to let to the lowest bidder who will give adequate security, all contracts for the performance of any work or for the supply of any materials for the various city departments, including the "department of public instruction," in all cases where the work and materials will cost to exceed fifty dollars, unless by an ordinance passed by an unanimous vote of the common council and by the unanimous approval of the board of estimate and apportionment, it is determined to be impracticable to procure the work or materials by contract.

This is sufficient to show that when the Legislature said that "the department of public instruction shall continue as provided by law" it did not mean that it was to continue without change and subject only to the provisions of the laws creating the department in the various cities of the second class, but rather meant that the department or the boards of school commissioners, whether appointed by the mayors, as was the case in Albany and Troy, or elected by the people, as was the case in Syracuse and Rochester, should continue to be so appointed or elected as provided by law, and with such changes as were made by virtue of the repeal of such provisions of the original laws creating the various boards as were inconsistent with the provisions of the "White Act." Thus does the department of public instruction

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in each of the cities of the second class continue as provided by law, just as the statute says it shall.

It seems plain, therefore, that so far as chapter 80, Laws of 1892, fixes the term of office of a school commissioner in Troy at three years, it must yield to the later provision contained in section 49 of the "White Act," giving the mayor authority to remove any city officer appointed by him, provided the mayor, in the exercise of his official duty, should see fit to abridge that term by a removal from office.

In a recent case in the Court of Appeals (Pryor v. City of Rochester, 166 N. Y. 548), Judge Martin reviews the history of the act for the government of cities of the second class (Laws of 1898, chap. 182), and discusses the legislative intent with reference to the powers conferred upon the mayor by that act. He quotes from the report to the Legislature of the commissioners appointed by the governor to report general laws for the government of cities of the second class, of which Judge Earl was chairman, as follows (p. 552): "We propose to give the mayor large power and great responsibility. He is the executive head of the city government. He appoints, and under certain conditions, may remove nearly all the city officers; and thus he can hold them all to responsibility for the manner in which they discharge their duties. He, himself, after a hearing and a trial of charges preferred against him, may be removed from his office by the governor. Thus, if there be bad administration of city affairs, it is easy for the electors to place the responsibility and to apply the remedy at the polls." Senate Documents, 1896, Vol. 5, No. 24.

After referring to various provisions of the act, Judge Martin says (p. 554): "It is equally clear that the legislative purpose was to confer all the executive and administrative powers of the city upon the mayor and such officers and departments as were created by law or ordinance, and that all the city officers, except as otherwise specially provided, should be appointed by him and removed at his pleasure, thus imposing upon him, as mayor, the entire responsibility of the appointments to office and of the administration of the affairs of the city, to the end that there might be a responsible head, which, if unsatisfactory, could be deposed by the electors of the city and existing evils consequently corrected."

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I conclude that the mayor had the power, under section 49 of the "White Act," to remove the relator from office and, therefore, that his complaint must be dismissed.

This conclusion finds support in some recent cases arising under the provision of the charter of Greater New York, which authorizes the mayor, during the first six months of his term, to remove certain persons holding offices by appointment. People ex rel. Baird v. Nixon, 32 App. Div. 513; People ex rel. Green v. Van Wyck, 159 N. Y. 509.

Judgment for the defendant, dismissing the complaint, with costs.

Complaint dismissed, with costs.

Matter of the Estate of HENRIETTA E. GULDENKIRCH, Deceased.

(Surrogate's Court, New York County, May, 1901.)

Executor — When not chargeable with his attorney's concealed debt to the testatrix.

An executor is not chargeable upon a judicial settlement of his accounts with the amount of his attorney's note to the testatrix (lost to the estate) where the executor had no actual notice of the existence of the indebtedness, nor any constructive notice except upon the legal theory that the attorney's knowledge was his, and particularly where the attorney was shown to have been guilty of numerous other improprieties in the case.

PROCEEDINGS upon the judicial settlement of the accounts of an executor. Objections to report of the referee.

Louis W. Stotesbury, for executor.

Elmer S. White, special guardian.

Ingle Carpenter, special guardian.

THOMAS, S. The executor was properly charged by the learned referee with all of the amounts set forth in the report, except only as to the sum of $910.50, being the amount due on a prom-

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issory note from the attorney for the executor to the testatrix. The liability of the executor for this sum could only rest upon the proposition of fact that he was legally chargeable with notice of the existence of this indebtedness on the part of his attorney, at a time when the attorney was solvent, and that it was lost to the estate by neglect of the executor to take seasonable efforts for its enforcement. It is quite plain that culpable neglect to collect a claim, which forms an asset of the estate, can only exist when knowledge, or notice legally equivalent to knowledge, of its existence is also found. This principle is emphasized in all of the cases upon this subject. Harrington v. Keteltas, 92 N. Y. 40; Mills v. Hoffman, 26 Hun, 594; Moore's Estate, 1 Tuck. 41; Matter of Hosford, 27 App. Div. 427; O'Conner v. Gifford, 117 N. Y. 275; Matter of Hall, 16 Misc. Rep. 174. No actual notice to the executor of the fact that his attorney was a delinquent creditor of the testatrix was shown or claimed, and the charge against him seems to have been made on the theory that he was chargeable with notice of facts in the knowledge of an attorney who was largely trusted by him. The rule that makes the knowledge of an agent the knowledge of his principal rests upon a presumption that the agent will act honestly and will communicate the facts truthfully. This presumption fails when it is shown that the attorney is violating his duty and is engaged in a scheme to defraud his principal, because he cannot in reason be presumed to have disclosed that which would expose and defeat his fraudulent purpose. Benedict v. Arnoux, 154 N. Y. 715, 729; Bienenstok v. Ammidown, 155 id. 47, 60; Henry v. Allen, 151 id. 1; Weisser v. Denison, 10 id. 68; Am. & Eng. Ency. of Law (2d ed.), 1145. In this case it is entirely improbable that the attorney who has been guilty of the numerous impropriieties shown in this case would have disclosed the fact of his own indebtedness, and thus have invited an action against himself for an obligation which his conduct shows he desired to evade and did not intend to pay. As to this one charge, the report of the referee is overruled. In other respects the report is confirmed. The executor is allowed commissions and costs for the preparation of the account, payable out of the estate. The disbursements of the contest are adjudged against him personally. Costs to contestants payable out of the estate.

Decreed accordingly.

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MAX FISCHER, Respondent, *v.* JOSEPH CONHAIM et al., Appellants.

(City Court of New York, General Term, May, 1901.)

Services — When inferred to be "satisfactory" to employers.

Where a foreman is employed for one year at a weekly salary and is also promised a weekly bonus if his services during the term are "satisfactory" and this is coupled with a proviso that he may be discharged at any time if his services are not "up to our (his employers') expectations," in which case he shall receive no bonus, the completion by the foreman of his term of service sufficiently indicates that his services were "satisfactory" and precludes the employers, in an action by the foreman's assignee to recover the bonus, from proving that they were unsatisfactory.

APPEAL from a judgment for the plaintiff, entered upon a verdict, and from an order denying the defendants a new trial.

One Max Spiro contracted with the defendants to serve for one year as foreman at twenty dollars per week, and the contract also contained the following provision: "If your services during the term of this agreement are satisfactory to us, you shall receive at the expiration of this agreement, a bonus equivalent to the sum of five dollars for each and every week during the term of this agreement, reserving the right to discharge you and terminating this agreement, before its expiration, at any time we think your services are not up to our expectations, in which case you shall not be entitled to any part of the bonus aforesaid mentioned." Max Spiro worked for one year and was paid his salary, but the defendants refused to pay him the bonus. Action was brought by the plaintiff, his assignee.

H. V. Rutherford, for appellants.

Joseph Wilkenfeld (John D. Connolly, of counsel), for respondent.

HASCALL, J. We think that the court did not err in refusing permission to defendants to testify that Spiro's services were unsatisfactory. The fact that they withheld the bonus, or pre-

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mium, upon good service, to the extent of withstanding suit to recover the same, was quite sufficient to show the operation of defendants' minds; and it would be idle now to say that they are dissatisfied, or were so when plaintiff's year of service had expired. Whether or not there was unfaithfulness on plaintiff's part, and whether the masters were or were not willing to overlook alleged breaches of duty in the servant (Gray v. Shepard, 147 N. Y. 177) seem to have been questions answered by the jury against the defendants in finding that if so committed they were overlooked.

The parties to the contract said if the services during the agreement "are satisfactory" the employee should receive a bonus, reserving the right to discharge him at any time when the defendants thought the services "not up to our expectations". Discharge was not made, so that, inferentially, the services were, during the agreement, satisfactory. Conversely, the defendants thought the services were up to their expectations, whether satisfactory or not. They might have expected plaintiff to turn out to be but an indifferent workman, and yet, having the right of discharge, at any time, reserved, were quite willing to give him a trial. Since the defendants did not exercise this right of discharge and terminate the employment, can they now arbitrarily say that they are not satisfied because the services did not come up to their expectations, and defeat a claim that the jury have found, as a fact, to be just and well founded?

We discover no error in the charge delivered by the court below.

Judgment and order should be affirmed, with costs.

FITZSIMONS, Ch. J., and O'DWYER, J., concur.

Judgment and order affirmed, with costs.

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SIMPSON CAHNMANN, Appellant, *v.* THE METROPOLITAN STREET RAILWAY CO., Respondent.

(City Court of New York, General Term, May, 1901.)

Res adjudicata.

A judgment recovered by partners, for the defendant's negligence in having damaged the firm horse and wagon through a collision, cannot be introduced to charge the defendant in a subsequent action brought by one partner to recover damages for personal injuries which he sustained by the collision, as the doctrine of *res adjudicata* has no application where the causes of action are not the same and the plaintiffs are different.

APPEAL from a judgment upon a verdict and from an order denying a new trial. Action for damages for personal injuries sustained from the alleged negligence of the defendant.

E. S. Cahn (Otto Horwitz, of counsel), for appellant.

John T. Little, for respondent.

HASCALL, J. It is complained that the appellant had been injured through the negligence of the respondent; that he was driving a horse attached to a delivery wagon; that a car, approaching from behind, ran against the wagon with so much force as to knock it and the horse down and throw the plaintiff to the street.

It appears that this plaintiff and one Hoffman had, as partners and owners, already successfully maintained a suit in a Municipal Court to recover for the alleged damage to their horse and wagon, and it was sought by plaintiff, suing here in his individual capacity for damages for injuries to his person, to make the judgment-roll and transcript of testimony in the Municipal Court action competent, conclusive and unimpeachable evidence against the defendant as to the question of negligence — the gravamen of the charge in both suits — and, having introduced this documentary proof, then to rest his case, save for a mere assessment by the jury of his compensation. The court sustained an objection by the defendant to the introduction of the papers in evidence, hold-

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ing that the contents did not constitute *res adjudicata* so as to conclude the defendant upon the trial herein, and the record shows that these papers were offered, excluded, and exception duly taken. Witnesses were then sworn upon both sides, the issues of fact submitted to the jury and the defendant had a verdict. The plaintiff now appeals, claiming that the court below erred in excluding the record of the action in the Municipal Court.

We are asked to maintain the doctrine that the defendant has already had its day in court, notwithstanding the fact that the causes of action are not the same and the parties are different, on the theory that these matter not, since the defendant is charged, in both suits, with negligence.

It has been authoritatively held that *res adjudicata* must be upon the merits and upon a judgment, that convenience and public policy require that issues which the parties have submitted to a court of competent jurisdiction and had determined are put to rest, and are not to be reopened and relitigated; that their adjudication is conclusive, in all subsequent controversies between them, where the same matter comes again directly in question. House v. Lockwood, 137 N. Y. 268. This is not a case that possibly might be successfully invoked by the defendant setting up a former adjudication, and we find that Reilly v. Sicilian A. Paving Co., 14 App. Div. 242, manifestly does not apply, since the parties are not the same. Such a judgment might be successfully urged by the defendant as a bar, and the plaintiff, if citing and using it, would only do so to his failure of recovery. The many cases referred to by the appellant on his brief would seem to bear out the doctrine of estoppel, but do not go to the extent and limit of absolute *res adjudicata*, unless the parties be the same and the subject-matter the same in both actions. And this is the view in the decision of the United States Court of Appeal (Metropolitan St. R. Co. v. Gumby, 99 Fed. Repr. 192) in causes of action much closer to the line than the one now before us. The appellant would certainly find his action barred here were the Municipal Court judgment rendered between the identical parties (31 App. Div. 302); and how shall we say that, had there been ten or more occupants of the wagon, each with his individual injury and action, we must hold here, *as matter of law and irrespective of further proof*, that each one of the ten is blameless and did not contribute to the

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accident by his own interference or carelessness, because the owner of the vehicle, one of his fellow passengers, had recovered in another court for an injury to his property? And yet this is where, by natural sequence, the plaintiff would bring us, if we pursue to its legitimate conclusion the very astute and completely presented theory of his learned counsel.

As announced by appellant upon the argument, that if we sustain the ruling below as to this principal question there is no need of further considering the case; but we have examined those portions of the charge of the trial justice, against which exceptions are noted, and find them well supported by authority.

Judgment and order should be affirmed, with costs.

FITZSIMONS, Ch. J., and O'DWYER, J., concur.

Judgment and order affirmed, with costs.

WILLIAM H. BRALL, Respondent, *v.* WILLIAM CLAUSEN, Appellant.

(City Court of New York, General Term, May, 1901.)

Services — Improper arbitrary discharge.

An employer cannot arbitrarily discharge an employee serving under a contract providing that the employer may discharge should he "find" the employee unfaithful or improper in the performance of his duties or in any manner inefficient therein, as under such a provision a discharge can be made only in case the employer, for good and sufficient reason, finds the employee unfaithful, improper in performance or inefficient.

APPEAL from a judgment for the plaintiff entered on a verdict, and from an order denying a motion of the defendant for a new trial on the minutes. Action for wrongful discharge.

Lamb & Voss (Daniel W. Guernsey, of counsel), for appellant.

William T. Matthies (Jerome Eisner, of counsel), for respondent.

SCHUCHMAN, J. This action was brought to recover from the defendant the sum of $1,950 as damages for an alleged wrongful discharge from employment, as salesman for the sale of picture frames and other merchandise, under a contract in writing. The contract was a hiring for the period of three years from August

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15, 1898, at a weekly salary of $25. The contract of hiring, as well as the discharge on January 20, 1899, is admitted. In regard to the discharge, the defendant pleaded justification, in that the plaintiff refused to obey instructions, was uncivil and insolent to the defendant and his customers, slept during business hours, sold goods for higher prices than they were marked, wrongfully converted two pictures to his own use, and did not properly measure pictures for framing.

The defendant maintained that he was justified in discharging the plaintiff on the aforesaid grounds, by reason of the following provisions contained in the written contract, to wit: "I. The aforesaid employment of the party of the second part by the party of the first part is conditioned always upon the faithful and obedient and proper performance of all duties pertaining to such position, provided that should the party of the first part find the party of the second part unfaithful or improper in the performance of his duty, or in any manner inefficient therein, he shall have the right to terminate his employment upon service by due notice in writing. II. The party of the second part agrees to faithfully and properly perform all services and duties as he may be called upon to perform by the party of the first part, and to faithfully and properly discharge all duties pertaining to said business."

At the trial evidence was submitted by both parties in regard to the faithful, proper and efficient discharge of the plaintiff's duties as salesman, and also in regard to his demerits in that respect. The conflicting evidence in regard to the proper and faithful performance of the plaintiff's duties was submitted to the jury by the trial judge, in a charge to which no exception whatsoever was taken, the judge stating: "If you believe that during the plaintiff's employment he did not give his proper and faithful attention to the business and was not as obedient as an employee should have been, or misconducted himself in any particular, then you have a right to find for the defendant. On the other hand, if you are satisfied that his conduct was proper, that he was faithful and attended to all his business, it will then be your duty to render your verdict in favor of the plaintiff." The jury rendered a verdict for the plaintiff for $500.

The defendant claims that the verdict is an unjust one, and that he had a right under the provisions of the contract to discharge

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the plaintiff at any time, at his own volition, arbitrarily and capriciously without any cause whatsoever, whenever the plaintiff's services proved unsatisfactory to his mind, and that no judicial tribunal could interfere with his determination. And he relies upon the cases of Tyler v. Ames, 6 Lans. 280; Spring v. Ansonia Clock Co., 24 Hun, 175. In those two cases, however, the provision of the contract was that the salesman "could fill the place satisfactorily," in other words, to the employer's satisfaction. In the case at bar, however, the contract reads, "should the party of the first part (the employer) *find* the party of the second part (the employee) unfaithful or improper in the performance of his duty, or in any manner inefficient therein, he shall have the right to terminate his employment."

We think the true rule applicable to the construction of such a contract is, that if *for good and sufficient reason* the employer finds the employee unfaithful, that he may then discharge him; that that which the law will say a contracting party ought in reason to be satisfied with, that it will say he is satisfied with. Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387; Smith v. Robson, 148 id. 252. This latter rule seems to have been applied by the trial judge, and we find no error therein.

At the trial, when the plaintiff rested his part of the case, the defendant's attorney said: "We make the usual motion to dismiss," which was denied and an exception taken; this motion was not renewed at the end of the trial, and we maintain that the exception is not a good one.

Judgment and order appealed from affirmed, with costs.

DELEHANTY, J., concurs.

Judgment and order affirmed, with costs.

PATRICK CURLEY, Respondent, *v.* THE F. & M. SCHAEFER BREWING CO., Appellant.

(City Court of New York, General Term, May, 1901.)

City Court of the city of New York — Consolidation of Municipal Court action — Code C. P., §§ 817, 818, 3347.

The City Court of the city of New York has power to remove to itself and consolidate with an action pending in it an action brought

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In the Municipal Court of said city, and should exercise the power where the parties in both actions are the same, the causes of action identical, arise out of the same transaction, are provable by the same evidence and are contested upon the same defenses.

APPEAL from order of the Special Term of the City Court of the city of New York, denying a motion made by the defendant to remove to said court an action commenced in the Municipal Court of the city of New York and consolidate it with this action.

Hirsh & Rasquin, for appellant.

Keating & Squiers, for respondent.

Per Curiam. An action was brought in the Municipal Court of the city of New York, about October 3, 1900, to recover $311 alleged to be due from the defendant to the plaintiff for rent of a store, known as No. 159 South Eighth street, borough of Brooklyn. The complaint sets forth two causes of action; the first for a balance of $10 for rent for the month of April, 1900, and the second for rent for the months of June, July, August, September and October, 1900, and water taxes, under a renting alleged to have taken place about April 20, 1900, for one year from May 1, 1900, at $660 per year, and $26 water taxes. On the return day of the summons the defendant answered, denying all the material allegations of the complaint, and gave an undertaking for the removal of the action to this court. An order directing such removal was accordingly made. The issues have been duly noticed for trial and the case is on the calendar of this court.

The second action was brought in the Municipal Court of the city of New York about February 27, 1901, to recover $220 alleged to be due from the defendant to the plaintiff for rent of said premises for the months of November and December, 1900, and January and February, 1901, under the same letting set forth in the second cause of action in the complaint in the first action.

Under section 1366 of chapter 378 of the Laws of 1897 (charter of the city of New York), an action can only be removed to the City Court from the Municipal Court of the city of New York, upon the giving of an undertaking where the amount sought to be recovered exceeds $250. The defendant, therefore, made the motion for removal and consolidation. No affidavits were sub-

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mitted by the plaintiff in opposition to the motion. The City Court of the city of New York has the power to remove to that court, and consolidate with an action pending there, an action brought in the Municipal Court of the city of New York. Code Civ. Pro., §§ 817, 818, 3347; McKay v. Reed, 12 Abb. N. C. 58, note.

The two actions were brought in favor of the same plaintiff against the same defendant for causes of action that might be joined; the nature of the causes of action was identical, arose out of the same transaction, was to be proved by the same evidence, and the same defenses were made to each cause of action. The denial of the motion subjects the defendant to two litigations, and the decision in the Municipal Court in the second action would in a great measure determine the prior action in this court. Sire v. Kneuper, 15 Civ. Pro. 434; Carter v. Sully, 19 N. Y. Supp. 244. If plaintiff desired to show that the granting of the motion would in some way prejudice him, he should have submitted affidavits to that effect. The motion should have been granted.

Order appealed from reversed and motion granted, with ten dollars costs and disbursements to defendant to abide the event.

Present: HASCALL and O'DWYER, JJ.

Order reversed and motion granted, with ten dollars costs to defendant to abide event.

WILLIAM J. CONNELL et al., Respondents, *v.* THE ERNST-MARX-NATHAN CO., Appellant.

(City Court of New York, General Term, May, 1901.)

Corporation — Limited powers of treasurer.

The treasurer of a corporation has only limited powers and cannot bind it for work, labor and services, as such a contract is beyond the scope of the duties of his office.

APPEAL from a judgment entered upon a verdict in favor of the plaintiffs, and from an order denying a motion for a new trial. Action for work, labor and services alleged to have been done and rendered for the defendant upon employment by its treasurer.

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Lewis S. Marx (David Gerber, of counsel), for appellant.

Edward J. Welch (David M. Neuberger, of counsel), for respondents.

Per Curiam. The plaintiffs failed to prove any authority in Carl Ernst, the treasurer of the defendant company, to bind or obligate it by his contract; and, as there was a failure to establish the cause of action alleged, the court below should have dismissed the complaint. The case of Parmelee v. Associated Physicians & Surgeons, 9 Misc. Rep. 458, is an authority directly in point. In that case, the plaintiff sued upon a contract of employment, which he said he made with the treasurer of the defendant corporation, purporting to act for the company; and the court there held that where the contract is made in the name of a corporation, by its president, or by any one possessing apparent general executive power, and the contract is in furtherance of the business of the corporation, there is a presumption of authority, but the treasurer of a corporation is an agent with special powers merely, and cannot bind such corporation by the performance of acts without the scope and ordinary course of the duties of his office.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

Present: HASCALL and O'DWYER, JJ.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

HENRY J. SILLECK, JR., Respondent, *v.* JOSIAH DAHUT, Appellant.

(City Court of New York, General Term, May, 1901.)

Practice — Failure to folio papers — General Rules of Practice No. 19.

Where an affidavit and order extending the defendant's time to plead are not folioed, the plaintiff has a right to return them within twenty-four hours.

APPEAL from an order of the Special Term of the City Court of the city of New York imposing, as a condition for the acceptance of the answer of the defendant, the costs and disbursements

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as taxed in the judgment-roll, and directing that the judgment entered on default stand as security. The answer was not folioed as required by rule 19 of the General Rules of Practice.

Joseph Rosenzweig, for appellant.

P. A. Hatling, for respondent.

Per Curiam. The plaintiff had a right to return the affidavit, and order extending defendant's time to plead for failure to comply with the requirements of rule 19 of the General Rules of Practice, and, having done so within twenty-four hours, the defendant was in default on the 11th day of January, 1901; being in default, it was well within the discretion of the Special Term to impose, as a condition for compelling the acceptance of the defendant's answer, the payment of costs and the giving of security. Furthermore, it appears that the defendant has complied with the terms of the order by paying the costs as taxed in the judgment-roll and serving his answer. By submitting to the terms of the order, the defendant waived his right to appeal therefrom.

Order appealed from affirmed, with ten dollars costs and disbursements.

Present: FITZSIMONS, Ch. J., and O'DWYER, J.

Order affirmed, with ten dollars costs.

JOSEPH BRICK, Appellant, *v.* THE METROPOLITAN STREET RAILWAY CO., Respondent.

(City Court of New York, General Term, May, 1901.)

Negligence — Erroneous charge as to contributory negligence.

In an action based upon negligence, it appeared that the plaintiff was injured because he jumped back from a carriage against the shaft of the defendant's cart. The court instructed the jury that the plaintiff must show himself free from any contributory negligence such as might have brought about the accident and that he must also establish that the negligence was entirely that of the defendant.

Held, that the charge was erroneous in both branches and that the plaintiff was only bound to show himself free from any negligence which contributed proximately to the accident.

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APPEAL from a judgment entered upon a verdict in favor of the defendant and from an order denying the plaintiff's motion for a new trial. The action was by the plaintiff, a street sweeper, to recover for personal injuries caused by being run over by a wagon, or cart, of the defendant.

Harrison, Seasongood & Edwards (Wm. H. Leonard Edwards and Clifford Seasongood, of counsel), for appellant.

Henry A. Robinson (John T. Little, of counsel), for respondent.

Per Curiam. The court charged the jury as follows: "The plaintiff, in order to recover, must not only establish to your satisfaction from the evidence presented, that he has been entirely free from negligence *and from any contributory negligence such as might have brought about the accident,* but he must also as well establish to your satisfaction *that the negligence was entirely the negligence of the defendant.*" To this portion of the charge plaintiff duly excepted. It was error for the court to charge that it was necessary for the plaintiff to prove his freedom from any contributory negligence such as might have brought about the accident. The correct rule of law is that the plaintiff's negligence must have contributed to the accident, and that negligence must be proximate and not remote.

It was further error in this case, in view of the defendant's story of how the accident happened, *i. e.*, that the plaintiff jumped back from a carriage against the shaft of the defendant's cart, for the court to charge that the plaintiff was bound to show that the negligence was entirely the negligence of the defendant. It may be that the accident occurred by reason of the negligence of the driver in charge of the carriage passing by and the negligence of the defendant's servant. All that the plaintiff was called upon to prove was that the accident occurred without negligence on his part contributing thereto, and because of the negligence on the part of the defendant.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to appellant to abide the event.

Present: FITZSIMONS, Ch. J., HASCALL and O'DWYER, JJ.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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JANE BEMUS, Plaintiff, *v.* LUCIA A. THRALL et al., Defendants.

(Supreme Court, Erie Special Term, May, 1901.)

Costs — Against defeated claimant of a foreclosure surplus.

Where a second mortgage, under which the mortgagee named therein claims a surplus resulting from the foreclosure of a prior mortgage, is found by a referee in the surplus money proceeding to be fraudulent as to judgment creditors of the mortgagor, and the said surplus is insufficient to pay their claims, the second mortgagee will be charged personally with the costs of the proceeding.

MOTION by claimants of surplus moneys arising from sale of mortgaged premises to charge claimant Thrall with payment of costs.

Alfred L. Furlow, for George T. Armstrong, receiver in supplementary proceedings taken by judgment-creditors of the mortgagors, for motion.

Jerome B. Fisher, for claimant Brigham N. Thrall, opposed.

CHILDS, J. This is a motion by claimants of surplus moneys arising from sale of mortgaged premises to charge the claimant Brigham N. Thrall with the payment of costs.

Upon the motion to confirm the report of the referee in this proceeding, which was unopposed, an order was made confirming the same and charging Thrall, personally, with the payment of $250 costs. That order has been, by stipulation, so far vacated as to permit the claimant Thrall to be heard on the question of costs, and that question has now been presented by counsel both on the part of the claimants and Thrall. Thrall claimed the whole surplus as the holder of a subsequent mortgage executed by Thrall & Peck, the owners of the equity of redemption under the mortgage foreclosed. The referee, after a protracted hearing or trial, reached the conclusion and decided that the mortgage under which Thrall claimed was given without consideration and to hinder, delay and defraud the creditors of Thrall & Peck, and was, as to the creditors of Thrall & Peck, fraudulent and void. The dis-

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position of this motion has required an examination of the testimony taken by the referee, and such examination has led to the conclusion that the findings of fact and conclusions of law of the referee are supported by such testimony, and that the mortgage held by Thrall was properly held not to entitle him to the surplus in question. The other claimants are judgment creditors of Thrall & Peck, and it appears that an application of the entire surplus arising from the sale in this action will come about $300 short of paying their judgments and the costs of this proceeding, and that such costs were substantially all incurred in defeating the fraudulent claim of Thrall. Such being the situation, it is not inequitable that he should indemnify the other claimants from loss by reason of the costs thus incurred.

The order heretofore made requiring Thrall to pay $250 of such costs should stand and an order to that effect may be entered.

No costs of this motion besides the ten dollars awarded on the confirmation of the referee's report.

Ordered accordingly.

WILLIAM E. MELODY, Plaintiff, *v.* WILLIAM W. GOODRICH et al., Defendants.

(Supreme Court, King's Special Term, May, 1901.)

Injunction — Justices of the Appellate Division cannot be restrained by a justice of the Supreme Court from the performance of a judicial act — Code C. P., § 605.

A justice of the Supreme Court has no power temporarily to enjoin the justices of the Appellate Division of his department from proceeding under an act (L. 1901, chap. 602) directing them as such justices to appoint a commissioner of jurors for a county within the department, the ground of the injunction being the alleged unconstitutionality of the act.

Such an injunction is improper for the further reason that the justices of the Appellate Division are State officials and an application to a justice of the Supreme Court for an injunction against them is forbidden by Code C. P., § 605, requiring the application to be made at a term of the department.

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PLAINTIFF is commissioner of jurors and a taxpayer in Kings county and here seeks to enjoin the defendants, as justices of the Appellate Division, from appointing a commissioner of jurors in Kings county under the provisions of chapter 602 of the Laws of 1901, challenging the constitutionality of the act in question.

This motion is to continue *pendente lite* an injunction heretofore granted herein.

R. H. Elder, for plaintiff.

F. S. Black and H. W. Goodrich, for defendants.

MADDOX, J. The character of this application can be fully appreciated only when we consider the possible consequences to flow from one branch of the court restraining or attempting to restrain, by continuing *pendente lite* a temporary injunction, the action or conduct of judicial officers of the same court and who constitute an appellate division thereof.

Plaintiff seeks not to stay the hands or conduct of litigants, but the performance of a duty cast upon "the justices of the Appellate Division of the Supreme Court" by legislative enactment, and in justification thereof asserts the unconstitutionality of the act vesting that duty.

By the statute in question those charged with the duty of making the appointment therein provided for, in so doing will act in their judicial capacity, not individually but as "the justices of the Appellate Division of the Supreme Court" in this department for that is the plain reading of the law.

I express no opinion upon the constitutionality of the act; that is unnecessary in view of the conclusion I have reached, and, in my opinion, the propriety of so doing here might well be questioned, or there is no presumption that a judicial officer will give, or attempt to give, effect to or act under a law which is violative of the Constitution, nor yet do that which is, either expressly or inferentially, forbidden by the organic or statute law of the State. That the contrary obtains needs no citation of authority.

If this law offends the Constitution, then the defendants as "justices of the Appellate Division of the Supreme Court" must so determine; that duty, as well as that calling for the appointment of a commissioner of jurors, is devolved upon them, for, as

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is well said in Norton v. Shelby County, 118 U. S. 442, "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Again, the defendants, as justices of the Supreme Court, are State officers, and the application for the temporary injunction was clearly within the inhibition of section 605 of the Code of Civil Procedure, and the order of May first, in so far as it undertook to enjoin the defendants as such justices, was and is a nullity.

JOSEPH E. LUMBARD, as Treasurer, etc., Plaintiff, *v.* LEWIS J. GRANT and ROBERT T. BRYAN, Defendants.

(Supreme Court, New York Special Term, May, 1901.)

Unincorporated association — Members not partners nor agents.

The rule that one partner is to be deemed the agent of another partner where he renews a written lease of firm real estate for a fixed term and rent does not apply to a case where a mere member of an unincorporated tennis club renews, in his own name and for his own benefit, a lease of a tennis ground which the club had held as tenant at sufferance without payment of rent, as members of such an association are not partners and there can be no agency in the absence of express proof of it.

DEMURRER to complaint. The facts are fully stated in the opinion.

Mooney & Shipman (Andrew J. Shipman, of counsel), for plaintiff.

Kellogg & Beckwith (Dean Emery, of counsel), for defendants.

ANDREWS, G. P., J. This is a demurrer on the part of both defendants to plaintiff's complaint on the grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) that the plaintiff has not legal capacity to sue. The plaintiff is seeking through this action to have a certain lease

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claimed to be possessed by one or other of the defendants impressed with a trust in favor of the plaintiff, or else to have it adjudged that the defendant Grant acted as plaintiff's agent in procuring said lease. The relief asked is, first, that the said lease be declared to be the property of the plaintiff, and, second, that defendants be required to assign the same to the plaintiff. The material allegations of the complaint are as follows: For the past ten or twelve years there has been in the Harlem section of this city an unincorporated association or club known as the Lenox Tennis Club, of which the plaintiff Lumbard was, at the commencement of this action, the treasurer; that during this club's existence it has used and occupied as a tennis ground a plot of land at One Hundred and Twenty-third street and Manhattan avenue, the nature of the tenure of the club being that of sufferance by the owner unaccompanied by the reservation or payment of any rent; that, two years since, the defendant Grant became a member of the plaintiff's club, and that prior to March first said defendant and others organized another tennis club in Harlem, consisting largely of members of the Lenox Tennis Club, and that about the same time said defendant Grant obtained from the owner of the grounds in dispute a written lease in his own name for a period of one year, from March 1, 1901; that the new club, which is known as the New York Lawn Tennis Club, is the codefendant in this action, and that the defendant Grant threatens to turn over to the said new club the lease in question. The claim on behalf of the plaintiff is that the relations of the defendant Grant to the Lenox Tennis Club were such that, in procuring this lease, he must be regarded as having acted as the plaintiff's agent, and that he holds the lease as trustee for the plaintiff. The main reliance of the plaintiff for support of his claim appears to be the well-known case of Mitchell v. Reed, 61 N. Y. 123. In that case, however, the plaintiff and defendant were partners holding the Hoffman House property under a written lease, for a fixed term, at a reserved rent, and the case was decided upon the theory that the partner who procured a renewal of the lease must be regarded as having acted as the agent of the other. The facts in the case at bar are entirely dissimilar, and that case does not, therefore, apply. The defendant Grant was not an officer of the plaintiff club, nor was he a partner with the other members of the club. In Lafond v. Deems, 81 N. Y.

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514, the court used the following language: "Nor are the plaintiffs entitled to the relief claimed upon the ground that the members of the society were copartners. Associations of this description are not usually partnerships * * * The purpose is not business, trade or profit, but benefit and protection of its members, as provided for in its constitution and by-laws. In accordance with well-established rules, no partnership exists under such circumstances." In Ostrom v. Greene, 161 N. Y. 361, speaking of an unincorporated club or association, the court used the following language: "Neither did its members possess the powers or share the responsibilities of copartners in all respects, for one was not presumed to be the agent of all, the death of one did not dissolve the association and no member was liable to a creditor unless in some way he assented to the contract creating the liability." In Georgeson v. Caffrey, 71 Hun, 477, in speaking of a voluntary association or club, the court said: "As between the members, no partnership existed, for there was no agreement, express or implied, to that effect. (See Lafond v. Deems, 81 N. Y. 514.) The failure to incorporate did not make the members partners. (Merchants' Nat. Bank v. Pendleton, 29 N. Y. St. Repr. 891, and cases cited; affd. *sub nom.*, Merchants' Nat. Bank v. Kirby, 129 N. Y. 662)." The case of Wells v. Gates, cited by the plaintiff, is not an authority in his favor. There seventy-five persons agreed in writing to form an association for the purpose of establishing a newspaper. They appointed three persons as managers, authorizing them, when sufficient capital should be subscribed and paid in or secured, to establish and conduct a paper for the benefit of the stockholders. In an action brought against the individuals composing the association to recover for articles necessary in carrying on the business, purchased by the agents, it was merely held that the defendants were liable as partners. In McMahon v. Rauhr, 47 N. Y. 70, the court said: "The parties to this action are members, with other persons of a voluntary association not incorporated. The object of the association is innocent pleasure, and not trade, business, adventure or profit. It is not strictly a copartnership, for it does not in its objects fall within the definition of one. But the rights of the associates in the property, and the modes of enforcing them are not materially different from those of partners in partnership property." Neither of these cases, however, nor any of the others cited by the learned counsel for the plaintiff appear to me to support the contention that the

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defendant Grant, in taking the lease in question, must be regarded as a partner of the other members of the association, nor as having acted as their agents in procuring such lease. I am inclined to think that the complaint is also demurrable upon the ground that the plaintiff does not state that he was authorized to bring this action. But as I am of the opinion that the complaint does not state a cause of action, it is not necessary to consider this ground of demurrer. The demurrer will be sustained, with leave to the plaintiff to amend, if he should see fit to do so, on payment of costs.

Demurrer sustained, with leave to plaintiff to amend on payment of costs.

BUTLER BROTHERS, Plaintiff, *v.* CHARLES F. HIRZEL et al., Defendants.

(Supreme Court, New York Trial Term, May, 1901.)

Goods sold — Failure to prove delivery — Remedy of vendor by action for the price.

An action for goods sold and delivered must fail as to the allegation of delivery where the proof is that, under orders from the vendee, a common carrier refused a stipulated delivery attempted to be made to it by the vendor and that thereupon the vendor took the goods away and kept them.

Semble, that vendor should have sued for the price under a contract of purchase and sale.

ACTION for goods sold and delivered.

Baggott & Ryall (George Ryall, of counsel), for plaintiff.

Wells & Ruebsamen (Alfred J. Talley, of counsel), for defendants.

BLANCHARD, J. This action was brought to recover for goods sold and delivered. On the trial counsel agreed that the only question to be decided was whether, as a matter of law, there was a delivery of the goods in question, and each of them moved for a direction of a verdict and the court reserved decision. It appears from the evidence in the case that an order in writing

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was given by defendants to the plaintiff "to ship on board the Steamship Allianca, Pier 57, North River, on or before the 6th day of October, 1900, goods marked and numbered as follows," etc. The goods designated on the order blanks were selected at defendants' place of business from a catalogue issued by plaintiff. The evidence is, and there is no dispute concerning it, that on October 6, 1900, the merchandise, packed in cases, was carted by plaintiff's carman to the pier from which the Steamship Allianca ships, and its receipt was there refused by the steamship company under instructions from defendants, and these cases of merchandise were thereupon carted back to plaintiff's place of business by plaintiff's carman. Plaintiff claims that the offer of the goods at the steamship dock constituted a delivery sufficient for the maintenance of this action. The complaint is not founded upon a contract of purchase and sale, but is strictly in conformity with the common-law action of assumpsit on the count of goods sold and delivered, and it was upon this theory that the action was tried. Considering it, therefore, in this light, I have reached the conclusion that there was no delivery warranting a recovery in this action. A case in point is that of Hague v. Porter, 3 Hill, 141. The facts as set forth in the report of the case are as follows. There plaintiffs sued defendant "to recover the value of 100 lamps alleged to have been sold by the plaintiffs to the defendant. The declaration was for goods sold and delivered. Plea, *non assumpsit.* The defendant ordered 100 more lamps of the same kind, which were to be made and delivered as soon as practicable. The price was agreed upon. * * * After the lamps were completed according to directions, they were boxed up and sent by a carman to the defendant's store. The defendant refusing to receive the lamps, they were left on the sidewalk; and the present action was brought to recover the agreed price. The court below directed a nonsuit, on the ground that there was no proof of a delivery of the lamps. The plaintiffs excepted, and, after judgment, sued out a writ of error." Judge Cowen, in the opinion affirming the judgment of the court below, says: "Here was no actual delivery and acceptance by the defendant below. The contract was executory, and he refused to receive. It was scarcely a case of goods bargained and sold. The count should, I apprehend, have been special, for refusing to accept. All the cases on this point were considered in Atkinson v. Bell, 2 Man. & Ryl.

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292, 8 Barn. & Cress. 277, S. C., and the subject entirely exhausted; indeed the case itself is directly against the plaintiff in error." More was done in that case to effect a delivery than in the case at bar. There the goods were left at the designated place of delivery. In the case at bar this was not attempted. The goods never left the possession of the plaintiff. They remained in the possession of plaintiff's carman and were by him taken back to plaintiff's place of business, where they have since remained. Plaintiff has never lost dominion over them. The rule of law laid down in the case cited does not seem to have been questioned, so far as I have been able to ascertain, and none of the authorities called to my attention by counsel lays down a different rule. The case has not been overruled, but was cited with approval in Rodgers v. Phillips, 40 N. Y. 530, but on another point. The cases to which I am referred by counsel are not in point. While some of them treat of the subject of delivery, it is in other connections. As stated in the American note to Benjamin on Sales (7th ed., p. 718): "The word 'delivery' is unfortunately used in various senses, and to express various shades of meaning," and the enumeration of them then follows. My attention is called to some authorities, such as Mason v. Decker, 72 N. Y. 595, and Mackie v. Egan, 6 Misc. Rep. 95, where it has been held that a tender of delivery in conformity with the agreement of sale is sufficient to base an action for the purchase price. This is not an action brought to recover the agreed price of merchandise under an agreement of purchase and sale. It may be that had the action been brought in that form plaintiff would have been entitled to judgment. The opportunity to change the form of the action was afforded to plaintiff on the trial, but counsel chose to proceed under the existing form for goods sold and delivered. Under the submission as it is made to me I must conclude that there was no proper delivery, and hence the defendants must have judgment dismissing the complaint, with costs. No extra allowance. Thirty days to make a case and thirty days' stay of execution after entry and notice of judgment.

Complaint dismissed, with costs.

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COBURN H. JOHNSTON, Plaintiff, *v.* PAUL BERLIN et al., Defendants.

(Supreme Court, New York Special Term, May, 1901.)

Principal and agent — The latter cannot sue in equity for an accounting of commissions — Complaint, when dismissed.

An agent cannot maintain an equitable action against his principal for an accounting of commissions alleged to have been earned by him but should sue at law.

Where he does not ask that his equitable action be retained by the court for the purposes of relief at law, it must be dismissed, but without prejudice to an action at law.

ACTION for an accounting.

Franklin Bien, for plaintiff.

Nathan, Leventritt & Perham (Edgar M. Leventritt, of counsel), for defendants.

BLANCHARD, J. This action is brought to secure an accounting for certain commissions plaintiff claims to be due him from defendants, upon certain alleged sales and duplicate orders, under an agreement whereby plaintiff was employed by defendants as a salesman, and to recover the amount ascertained by such an accounting. Defendants contend that the action is one of which equity cannot take cognizance; that the allegations of the complaint and evidence given upon the trial disclose no relationship between plaintiff and defendants save that of salesman and employers, and that such a relationship will not support an action in equity for an accounting and that, accordingly, the action must be dismissed. This contention is sustained by the authorities. Smith v. Bodine, 74 N. Y. 30; Chaurant v. Maillard, 56 App. Div. 11; McCullough v. Pence, 85 Hun, 271; Skilton v. Payne, 18 Misc. Rep. 332.

The position of the plaintiff, so far as the retention of the case for the purpose of awarding him legal relief, is concerned, is precisely the same as in Skilton v. Payne, *supra*. Plaintiff has

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not asked for such retention. He stands upon his right to equitable relief, and upon the authority of that case and the cases there cited, the complaint must be dismissed, with costs, but without prejudice to an action at law.

Complaint dismissed, with costs.

CHARLES T. GARLAND and ROBERT B. DODSON, as Executors, Etc., et al., Plaintiffs, *v.* ANNIE LOUISA GARLAND et al., Defendants.

(Supreme Court, New York Special Term, May, 1901.)

Trust — Void accumulation — Separable from scheme of distribution — Disposition of accumulation.

Personal property can be accumulated only during the minority of beneficiaries (L. 1897, chap. 417, § 4), and therefore a testamentary direction to the trustees of a residuary estate that they shall pay the testator's widow a fixed sum for life from the income, accumulate any surplus income, and add it to the principal of the residuary estate, is unlawful.

The unlawful accumulation does not, however, affect the validity of the life provision for the widow, nor the validity of prior, distinct and separable trusts for children of the testator, to which trusts the entire residuary estate is directed to pass in equal shares upon the widow's death.

The accumulated income, and any excess of income accruing in the future, will pass to the last mentioned trustees as the persons presumptively entitled to the next eventual estate.

ACTION for the construction of a will. The nature of the action and the material facts are stated in the opinion.

Evarts, Choate & Beaman (William V. Rowe, of counsel), for plaintiffs.

Coudert Brothers (Lorenzo Semple, of counsel), for defendant Annie L. Garland.

Eliot Tuckerman, for defendants James A. Garland and Charles T. Garland, individually, and Marie T. Garland.

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John S. Sheppard, Jr., for defendant trustees.

Charles N. Harris, for defendant Louise Garland Emmet.

William V. Rowe, for defendant Harvard College.

William T. Emmet, guardian *ad litem* of infant defendants.

GIEGERICH, J. This action is brought for the construction of a will.

The testator died in July, 1900, leaving a last will and testament by which he disposed of a large estate. Three trust funds are specifically created, each of the amount of $500,000, for each of the testator's three children, the rents and profits in each case to be paid over by the trustees to the respective beneficiaries. The will further directs the trustees to hold the residue of the estate in trust for the widow for life, and to pay therefrom to her the sum of $12,000 per year, further providing that "should the income from such residue exceed $12,000 per annum the excess shall be added annually to the principal of said residue." There was also the following further directions: "Upon the death of my wife, I direct my executors and trustees to divide the said residue of my estate then remaining into three equal parts, and to add one of said parts to each one of the said separate funds of Five hundred thousand dollars, established as hereinbefore directed and to dispose of the same in the manner hereinbefore directed for the disposition of said separate funds."

The residue of the estate, remaining after the three trust funds above mentioned were completed, has proved to be upwards of one million dollars, consisting of personalty, with the exception of a small amount of real estate in Maine, and the excess of income from such residue, above the $12,000 directed to be paid to the widow, is about $40,000.

It is conceded by all parties that this direction to accumulate the surplus of income is void as being in contravention of the statute, and the only questions for determination are *first* whether that direction was so intimately connected with the general scheme of disposition on any particular part thereof, as to nullify the whole or such part, and *second*, if there is not such an intimate relation, and the other provisions of the will stand, then to whom shall this excess of income be paid.

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The prohibitions against the accumulation of income of personal property are now found in section 4 of the Personal Property Law, chapter 47 of the General Laws (Laws of 1897, chap. 417), and are very similar to the corresponding prohibition against accumulations of rents of realty which is found in section 51 of the Real Property Law, being chapter 46 of the General Laws (Laws of 1896, chap. 547). Both these sections are substantial reenactments of earlier provisions found in the Revised Statutes (1 R. S. 726, §§ 37, 38; 1 R. S. 773, §§ 3, 4, respectively), and consequently the earlier decisions are still applicable to such cases.

In Williams v. Williams, 8 N. Y. 525, 538, it was held that the direction for accumulation only is void in such a case as this, and that the legacy itself is not defeated. The doctrine of the foregoing case was reaffirmed in Kilpatrick v. Johnson, 15 N. Y. 322, 324; Manice v. Manice, 43 id. 303, 384; Pray v. Hegeman, 92 id. 508, 519; Barbour v. De Forest, 95 id. 13, 16; Cochrane v. Schell, 140 id. 516, 535, and Hascall v. King, 162 id. 134, 152.

From these authorities it follows that, although the accumulation cannot be made as the testator desired, nevertheless the trust for the widow and the remainders over to the children are left unaffected, and the only question to be determined is how the excess of income shall be distributed.

The Real Property Law provides (General Laws, chap. 46, § 53) as follows:

"53. When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate."

While this section has never been incorporated into the laws governing personal property, it is, in effect, made a part thereof by the general provision that "in other respects, limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property." Personal Property Law (General Laws, chap. 47, § 2).

And in Cook v. Lowry, 95 N. Y. 103, 108, it was held to be settled by the great weight of authority that the sentence last

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quoted makes applicable to personal property section 53 of the Real Property Law, which was at that time 1 Revised Statutes, 726, section 40.

Who, then, are the "persons entitled to the next eventual estate?" Are they the trustees of the several funds, or are they the respective beneficiaries? The answer to the question is not of very substantial importance, as in either case the money will go at once to the beneficiaries, but in the one case it would go through the hands of the trustees, while in the other case it would go directly.

In Manice v. Manice, *supra*, 385, 386, it was decided, under circumstances similar to those now presented, that the trustees should take, and that decision controls in this case.

The accumulated income should, therefore, be divided into three equal parts and one of such parts be paid to the respective trustees of each of the three funds who should, in turn, pay over the same, as income, to their respective *cestuis que trustent*. The same course should be followed with the surplus, hereafter, as it from time to time accrues.

Ordered accordingly.

Matter of the Assignment of ALBERT J. FARMER to WILLIAM WOLFF for the Benefit of Creditors.

(Supreme Court, New York Special Term, May, 1901.)

Assignment for creditors — Notice to them on discharge of deceased assignee's surety — L. 1877, ch. 466, §§ 10, 11, 12, 13, 20, subd. 5.

Where a general assignee dies and a compulsory proceeding is taken by certain of the creditors to have his personal representatives render a final accounting of the trust and this results in a direction by the court that the representatives account for the assets, that the assets be transferred by them to a substituted assignee, and that upon such transfer the surety of the deceased assignee be discharged, all creditors interested in the trust must be cited as otherwise the surety cannot lawfully procure the discharge to which he is entitled.

MOTION to confirm the report of a referee.

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Robert Weil, for motion.

W. B. Hornblower, opposed.

GILDERSLEEVE, J. This is an application for an order confirming the report of a referee taking and stating the account of the personal representatives of a deceased assignee. The motion therefor is made by the creditors upon whose application the accounting was directed and taken, and is supported by the assignee substituted in the place and stead of the original trustee, whose estate is now accounting, while, on the other hand, it is opposed by the accounting administrators and by the surety upon the bond of the original assignee upon the various grounds stated in their respective exceptions and briefs. The papers in the accounting are so many and voluminous, and the items considered and determined are so extensive and complicated, that the court might properly, on this motion, adopt the position taken in the case of Smith v. Fitchett, 56 Hun, 473, p. 475, and refuse to reverse the findings of the referee, unless they are obviously erroneous. Without taking this view, however, it is evident, from a careful reading of all the papers, that the findings and conclusions of the report are not contrary to or against the weight of evidence, or erroneous, but that, on the other hand, the former are the necessary results of the testimony taken at the hearings, and the latter are properly explained and fully justified by the statements of the lengthy and careful opinion submitted by the referee with his report. It is urged, however, and with particular emphasis, by the surety upon the bond of the original assignee that the court should refuse to confirm the report of the referee, by reason of the irregularity in the proceedings in which it is made, consisting of the failure of the petitioning creditors to cite to the settlement of the account all creditors of the assigned estate who had duly presented verified claims to the assignee. It is contended that, in view of this conceded omission, the said creditors, not cited, cannot be and are not bound by this report made in a proceeding to which they were not parties and of which they had no notice; that, as to them, the discharge of the surety contemplated by the order of reference cannot be granted; and that they may, at any time, reopen the matter or bring new and independent proceedings. The orders appointing the substituted assignee herein, upon the death of the

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original assignee, and directing an accounting and transfer of the assigned property by the personal representatives of the latter, were evidently made, and the proceedings herein were evidently had, under the authority of section 10 of the Assignment Act (Laws of 1877, chap. 466), as construed by Matter of Tousey, 2 App. Div. 569. This case, construing the said section, held — after declaring that an assignment for the benefit of creditors is an express trust, vesting, upon the death of the original assignee, in the Supreme Court, which may appoint, as successor of the deceased assignee, persons other than his personal representatives — that in making the appointment of such a successor the court should direct the personal representatives to account for the original assignee's proceedings, to turn over all the property of the estate to the new assignee, and that the sureties upon the bond of the deceased assignee should thereupon be discharged. Accordingly, upon the death of the original assignee herein, the substitution of his successor, and the qualification of his personal representatives, the court directed (1) the said personal representatives to account before the referee for "the property, funds and effects of the assigned estate, * * * with regard to the property and affairs of the assignment and to the proceedings" of the original assignee; (2) that the assigned assets be transferred by the said personal representatives to the substituted assignee, under the direction of the referee; and (3) that, upon such transfer and upon compliance with the order of this court made upon the accounting, the surety upon the bond of the original assignee be discharged from all further liability. Both the specific terms of the said order and the authority under which it was made required that the accounting herein be had to secure, and be such as would legally result in, the discharge of the surety upon the bond of the original assignee from all further liability. The accounting and transfer of the property should, the court says in Matter of Tousey (at p. 573), be had "not only that the new assignee may have possession of the assets of the estate, but that the surety of the old assignee should be discharged, as he had a right to be upon the termination of the trust as to the deceased assignee. * * * That the surety of the old assignee be discharged" from what liability? From liability upon the bond of its principal, the original assignee, conditioned for the faithful performance of his trust duties under the deed of assignment, including the collection, sale and conver-

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sion of the assets, the payment of proper, necessary and reasonable expenses, and the distribution of the balance of the estate among these creditors who have proved themselves entitled thereto. And from liability to whom? To all the *cestuis que trustent* under the assignment, *i. e.*, to all the creditors who are specifically mentioned therein, or who, by duly presenting and proving their verified claims against the estate, establish their right to share in the distribution thereof. The rights of these creditors, as *pro rata* sharers in the balance of the estate, are necessarily involved in and affected by any proceeding in which that balance is determined, and in which the primary liability of their trustee and the secondary liability of his surety for that balance are declared; in any such proceeding they are entitled to be, and should be, heard upon the matters above stated, upon which the ascertainment of that balance depends; their rights to their shares in the highest value of the estate of which they can offer competent and sufficient evidence cannot be affected, and the reciprocal liability to them of the assignee and his surety therefor cannot properly be discharged in a proceeding to which they never were parties and of which they had no notice whatever. This is a general rule of procedure, founded in and consistent with reason and justice; accordingly, with reference to accountings under the Assignment Act, the court has power to discharge the assignee and his surety at any time upon performance of the decree, from further liability upon matters included in the accounting, only to creditors appearing, to creditors not having appeared after due citation, or not having presented their claims after due advertisement; and, by subdivision 23 of rule 6 of the Rules of the Appellate Division in this department, in no case can an assignee and his sureties be discharged, "except in a regular proceeding for an accounting under section 20 of the act, commenced by petition for citation and citation thereon to all persons interested in the estate." Section 11 of the Assignment Act, amended by Laws of 1878 (Chap. 318, § 3), provides for a citation to all parties interested in the estate to appear and show cause why a settlement of the assignee's account should not be had upon the petition of the assignee at any time after one year from the assignment, or upon the removal of an assignee. Section 12 states that the citation on the petition of a creditor may be addressed to and served on the assignee alone, and, on the return thereof, the assignee may have a general cita-

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tion issued to all parties interested; while section 13 describes the persons upon whom a "citation to all persons interested" must be served. Under subdivision 5 of section 20 the court has power, on a proceeding for an accounting under the act, to require the assignee to render and file an account of his proceedings, and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with a surrogate's order for an account. Code Civ. Pro., §§ 2727, 2728. It is, however, claimed that, in the case of a compulsory accounting, upon citation issued to the assignee or his representatives upon the petition of a creditor, it is unnecessary to cite to the settlement of the account all persons interested in the assigned estate; in support of this position the cases of Matter of Cowing & Co., 26 Hun, 214, and Matter of Robinson, 37 N. Y. 261, are cited. This contention overlooks the distinction between a proceeding for the rendering of an account by a trustee and a proceeding for the judicial settlement of the account after it is rendered, which was noted, in the case of administrators, in Remington v. Walker, 21 Hun, 322, and is indicated, in the case of assignees, in Matter of Cowing & Co., *supra*. The case last referred to, after reviewing the successive legislative enactments with reference to citations for and upon accountings by assignees, finally concludes that, under the Assignment Act, as finally amended, the court may, on a creditor's application, require the assignee to render an account, and this without bringing in all parties interested or (note the significant distinction!) proceeding to a final settlement. The case, therefore, is not an authority upon the point that upon the final settlement of the accounts of an assignee or his personal representatives it is unnecessary to cite all persons interested in the fund. So, too, Matter of Robinson, *supra*, is an authority upon the point that in a proceeding for the appointment of a trustee by the court the question to what parties notice shall be given is entirely discretionary with the court. So far as concerns the question involved in the present proceeding, the court says (p. 264): "This was not an application for the removal of a trustee and for the passing and settling of his accounts. Had it been such, all persons interested in the trust property and estate should have been notified and made parties to the proceeding in the absence of all excuse for the omission." Finally, in Matter of Reynolds & Co., 30 Misc. Rep. 398, the court refused to state the account of a removed assignee

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as filed, to allow him commissions and counsel fees and to cancel his bond and release his surety, upon payment of the net balance to his successor, "in the absence of creditors interested in the property of which an accounting is purported to be made." For these reasons the matter must be referred back to the referee, with a direction that a general citation to attend the settlement of the account herein be issued to and served upon all parties interested, unless the jurisdictional defect of nonservice of citation is, as it may be, cured by the voluntary appearance of all interested parties, as defined by section 13 of the Assignment Act, before the referee or by their written and acknowledged waivers of the issuance to and service upon them of said citation.

Ordered accordingly.

THE PEOPLE ex rel. CHARLES WEIL, Relator, *v.* JAMES J. HAGAN, as Warden of the City Prison, Respondent.

(Supreme Court, New York Special Term, May, 1901.)

Crimes — Sale of railroad tickets — Unconstitutionality of L. 1901, ch. 639.

Chapter 639 of the Laws of 1901, prohibiting the sale of railroad tickets by any one not employed by a railroad company nor duly authorized by such a company to sell them, is substantially the same in this particular with chapter 506 of the Laws of 1897 which has been declared unconstitutional by the Court of Appeals, and therefore a conviction under chapter 639 of the Laws of 1901 for a sale made by one, neither employed by such a company nor authorized to sell tickets, cannot be sustained.

HABEAS CORPUS.

Louis Marshall, for relator.

H. P. Keith, assistant district attorney, for respondent.

GILDERSLEEVE, J. The relator is charged with having sold a passage ticket over a certain railroad, or railroads, without any authorization of the railway company, or companies, and was ar-

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rested and committed to the custody of the warden of the city prison, the defendant herein. This commitment was in virtue of chapter 639 of the Laws of 1901, which prohibits anyone, not in the employ of the railway company or duly authorized by such company, from so selling tickets. The Court of Appeals, in the case of People ex rel. Tyroler v. Warden of City Prison, 157 N. Y. 116, holds as follows: "Chapter 506 of the Laws of 1897 (Penal Code, §§ 615, 616), which prohibits, and subjects to punishment as a crime, the selling of tickets for passage on vessels or railroad trains, by any person except common carriers and their specially authorized agents, transcends the police power and violates the constitutional guaranties of civil rights and privileges and of liberty, in so far as it undertakes to prohibit citizens of the state from engaging in the business of brokerage in passage tickets." It seems to me that for all practical purposes, so far as the facts and questions here involved are concerned, the act under which the relator was arrested is stamped with the same mark of unconstitutionality as the act referred to in the case above cited. The relator was a broker in passage tickets, and, if he could not be molested, as such, under the act of 1897, I fail to see how he can be punished under the act of 1901 for the same offense. The two acts are largely identical, and, in the respect now under consideration, must be held to be unconstitutional, by virtue of the doctrine laid down by the highest court of this State in the case above cited. While the court at Special Term will not ordinarily pass upon the constitutionality of an act of the Legislature, still it can scarcely be called upon to enforce the provisions of an act which are manifestly invalid. The relator will be discharged upon the ground that the provisions of the act of 1901, under which he was arrested, are unconstitutional, and no crime has, therefore, been committed.

Writ sustained and relator discharged.

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FERNANDO BALTES, as Executor, Etc., of EDMUND WARING, Deceased, Plaintiff, *v.* THE UNION TRUST CO. OF NEW YORK, Defendant.

(Supreme Court, New York Special Term, May, 1901.)

Remainder — When vested by agreement to divide — Executed agreement not to be repudiated — Trust.

Semble, where in a trust agreement it is provided that upon the death of the donor of a trust in personalty for whose life benefit to a fixed extent the trust was created, the *corpus* shall be divided between persons named in the instrument of trust, there is a vested remainder in such fund in said persons where they are certain and in being at the time when the agreement takes effect.

Where the donor, besides his inalienable life interest or annuity, has or may have alienable reversionary interests in the *corpus* as donor, and agrees that a substituted trustee may distribute the *corpus* among the parties entitled in remainder — his annuity having been provided for in another manner — his reversionary interests, if any, pass, and neither he nor his executor will be permitted by equity to repudiate the agreement and recover of the substituted trustee the value of the *corpus* divided and distributed by it.

ACTION to recover moneys alleged to have been distributed in violation of the trust under which they were held.

Leventritt & Brennan, for plaintiff.

Peckham, Miller & King, for defendant.

SCOTT, J. In 1876, Edmund Waring, the plaintiff's testator, was the owner of a large estate, consisting of both real and personal property. On November 8, 1876, he conveyed all his real property to his son William E. Waring, by a deed absolute in form, and William, simultaneously, executed a paper in which he agreed that he would immediately upon the death of said Edmund Waring, convey one equal one-half part of said real estate or the proceeds thereof to Katherine G. Secor, daughter of Edmund Waring, or if she were not then living, to her descendants. It was further provided that the agreement might at any time be canceled, and might from time to time be modified by the mutual agreement

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of Edmund and William E. Waring. At the same time William E. Waring executed another paper, wherein, in consideration of the conveyance to him of the real estate, he agreed to supply to his father, Edmund Waring, such moneys as he might require for his support and maintenance during his life, and also such further sum, not exceeding $1,800 per annum, as said Edmund Waring might personally request, if he should wish to pay the same for the support and maintenance of his wife Mrs. Clara K. Waring. More than four years afterwards, and on March 16, 1881, Edmund Waring, and his son William E. Waring, and his daughter, Katherine G. Secor, entered into an agreement which forms the basis of this action. The agreement recites that certain real and personal property had been theretofore assigned by Edmund Waring to William E. Waring, and a declaration of trust respecting the real estate made by William E. Waring, and an agreement entered into as to the support of Edmund Waring, and for the payment to him of certain moneys. That a further agreement had been made between the parties in respect to said personal property and the income therefrom and from the real estate during the life of said Edmund Waring. In order to carry out this latter agreement it was then provided and agreed, "that said William E. Waring does and shall hold said personal property during Edmund Waring's life in trust to pay annually from the income thereof the sum of Forty-eight hundred dollars to said Edmund Waring, to be made in equal monthly payments on the first day of every month, and to divide the surplus of said income, and the rents, issues and profits from the real estate * * * equally between said William E. Waring and Katherine G. Secor during the life of said Edmund Waring * * * and on the death of said Edmund Waring to divide any surplus income then unpaid, and all of said personal property equally between said William E. Waring and Katherine G. Secor." It was further provided that the agreement was not to affect in any way the declaration of trust dated November 8, 1876, respecting the real estate, but that it was intended to supersede the other agreement made at the same time relative to the support and payment of money to Edmund Waring. There was a further provision that in case a certain will of Edmund Waring, dated January 8, 1878, should be in force at his death, and his personal property should be insufficient to pay certain legacies therein specified, then said legacies should be paid by

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William E. Waring out of the personal property referred to in the agreement, or if the division of the personal property should be effected before such insufficiency had been ascertained, then William E. Waring and Katherine G. Secor each agreed to pay one-half thereof. By a supplementary agreement dated March 18, 1881, executed by the same parties, it was provided that William E. Waring would, if Edmund Waring so desired, make certain monthly payments to Mrs. E. Waring, the agreement to do so terminating, however, on the death of Edmund Waring. William E. Waring died on October 5, 1882, leaving a will, by which he devised and bequeathed all his estate, real and personal, to his widow, Frederika W. Waring, whereupon Edmund Waring and Katherine G. Secor petitioned this court for the appointment of a trustee in place and stead of said William E. Waring, and an order was accordingly made appointing the defendant herein such trustee. The appointment of a substituted trustee was opposed by Frederika W. Waring, upon various grounds, but the order therefor was ultimately affirmed by the Court of Appeals, after that court had modified the order of the Special Term "by striking out so much thereof as assumes to adjudicate upon the validity of the trust, if such provisions there are." The defendant thereupon commenced two actions in this court against Frederika W. Waring, widow of William E. Waring, one to recover possession of the real estate, and one to recover possession of the personal property, in both of which it was successful, the judgment in each case reciting that the estate, right or title of the plaintiff in or to said property was for the life of Edmund Waring. There were at this time three persons and only three, beside the substituted trustee, who could claim any interest in or right to the personal property. These were Edmund Waring, Katherine G. Secor and Frederika W. Waring, and they united in an agreement, the validity of which is put in issue in this action. This agreement, which was dated February 19, 1888, recited all the deeds, agreements, declarations of trust, actions, proceedings, order and judgments hereinbefore recited in detail. It further recited that the signatory parties were the only persons interested in the real estate and personal property, and that the parties of the first, second and third parts, to wit: Edmund Waring, Katherine G. Secor and Frederika W. Waring were desirous that all litigation touching the same should cease. It was thereupon mutually agreed, in addition to certain

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matters not material in this action, *first,* that the $4,800, which, by the agreement of March 16, 1881, was to be paid annually to Edmund Waring out of the income derived from the personal property, should thereafter be paid by the substituted trustee out of the rents, issues and profits of the real estate; *second,* that after payment of certain sums by way of counsel fees and commissions, the balance of the personal profits should be divided equally between Katherine G. Secor and Frederika W. Waring; *third,* that, except as modified by this agreement, the trust with reference to the real estate should continue during the lifetime of the party of the first part as provided in the deed to William E. Waring and the declaration of trust executed by him. This agreement, after its execution by Edmund Waring, Katherine G. Secor and Frederika W. Waring, was also executed by the defendant, and was thereupon carried into effect, the personal property being divided as therein provided, and the income of $4,800 per annum being regularly paid to Edmund Waring by the defendant, out of the rents of the real estate, until his death on August 16, 1895, he having survived his daughter Katherine G. Secor, who died on March 9, 1892. It does not appear that Edmund Waring, during his lifetime, ever raised any question as to the validity of the agreement under which the personal property was divided between his daughter and his son's widow. His executor, by his action, does attack the validity of this division, and seeks to recover from the defendant the value of the personal property, which was divided with the testator's acquiescence and co-operation. His position, broadly stated, is that such division was in contravention of the trust under which the personal property was held by William E. Waring in the first instance, and afterwards by the defendant as substituted trustee, and he cites in support of his action the familiar rule of the Revised Statutes that "if the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust shall be absolutely void." The instrument which created the trust in the present instance was the agreement of March 16, 1881, wherein was declared the terms of the trust upon which William E. Waring held the personal property. By that agreement the duration of the trust was limited to the lifetime of Edmund Waring, and during that term Edmund Waring was to have a life estate to the extent of $4,800 per annum, and William E. Waring and

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Katherine G. Secor were each to have a life estate to the extent of one-half the surplus after the payment of Edmund's annuity, and the other items charged upon the income. It is clear that none of them took any title to the *corpus* of the estate by reason of their life estates. R. S. (Banks' 8th ed.), 2438, § 60. If, therefore, Edmund Waring retained any interest in or title to the *corpus* of the personal property it was for some other reason than the fact that a life estate was reserved to him. So long as the trust continued, that is to say, during the lifetime of Edmund Waring, the whole estate, both in law and equity, vested in the trustee. There was, however, reversionary interest vested in someone. If, as claimed by defendant, that reversionary interest became, by the deed of trust, vested in William E. Waring and Katherine G. Secor, the executor of Edmund can assert no claim to the personal property, because Edmund himself had no interest therein which survived him. For the contention that they did take vested remainders under the trust agreement, there is much to be said. The statute provides that a future estate is vested, when there is a person in being who would have an immediate right to the possession of the property, upon the ceasing of the intermediate or precedent estate. R. S. (Banks' 8th ed.), 2432, § 13. Hence, if the trust agreement had in terms granted to William E. Waring and Katherine G. Secor the personal property upon the death of Edmund Waring, after his life estate or interest therein had terminated, there can be no doubt that they would have taken an unqualified vested remainder in the *corpus* of the estate, which, in the event of the death of either of them, would have passed to their personal representatives. It is claimed that the trust deed did, in effect, operate as a grant of such an estate or interest. The trustee undertook that upon the death of Edmund Waring he would divide the personal property equally between himself and his sister. It seems to be now well settled in this State that a direction or agreement to divide an estate upon the happening of a certain event is equivalent to an express gift where the persons among whom the division is to be made are certain and in being at the time of the taking effect of the instrument containing the direction for a division. The plaintiff, however, insists that there should be applied to this case the rule to be found in a long line of authorities, which hold that where the only gift is found in a direction to divide or pay

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at a future time, the gift is future, not immediate, contingent not vested. Hence, it is argued that the future estates of William E. Waring and Katherine G. Secor were contingent upon their surviving their father, and terminated upon their death before him; that upon the termination of their contingent estates or interest in the personalty, the reversion therein was undisposed of by the trust agreement, and vested in Edmund Waring, under the statutory rule that, "where an express trust is created every estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in, or revert to, the person creating the trust or his heirs, as a legal estate." R. S. (Banks' 8th ed.), 2439, § 62. The rule that a remainder is to be deemed contingent, and not vested where the only gift is to be found in a direction to pay over or divide at a future time, is not of universal application and is subject to important exceptions. As was said by the Court of Appeals: "It is true that the rule has many exceptions and is seldom alone relied upon." Clark v. Cammann, 160 N. Y. 315–327. In Matter of Brown, 154 N. Y. 313, there were no express words of gift to the grandchildren of testator, but there was a provision that, upon the termination of a life estate or estate created by the will, "the principal be equally divided between the children of my said daughters absolutely for their own property, subject however to the above provided life estates in the same" it was held that inasmuch as the grandchildren were in being at the time of testator's death, and, under the will, had the immediate right to the possession of the estate upon the termination of the life estates, they took vested remainders in the estate of the testator. In Clark v. Cammann, *supra*, the will gave a fund of $10,000 to his executors in trust to pay the income to a niece for life "And from and immediately after her decease, upon trust, to pay over and divide the said principal sum of $10,000 unto and among all her children, share and share alike, * * * and to their lawful representatives forever, as tenants in common, *per capita*, the issue of any such child who may then be dead to take his or her deceased parent's share." Although there were no express words of gift to the grandchildren, other than the direction to the trustees to pay over and divide, the court said that if the testator had stopped with the directions to pay over and divide the capital sum, upon the decease, of the life tenant, "among all her children share and share alike,"

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it would not have hesitated to hold that the legacies vested in the sons. Under the will as drawn, however, it felt constrained to hold the legacies contingent, and the reason for so holding seems to distinguish the present case from many authorities cited by the plaintiff. It said: "No issue of the sons was in being at the death of the testator, and it was uncertain as to whether they ever would have issue. The remainder was therefore contingent and not vested, for the reason that the persons to whom, or the event upon which the estate was limited to take effect, remained uncertain until the termination of the life estate." Under the trust agreement in the present case there was no uncertainty as to the persons to whom the personal estate was to go upon the death of Edmund Waring. If, however, the plaintiff be right in his contention that the reversionary interest of William E. Waring and Katherine G. Secor was contingent upon their surviving their father, and that upon their predecease this reversionary interest became vested in Edmund Waring, there still remains an insurmountable difficulty in the way of his recovery in this action. Edmund Waring's relation to the personal property would then have been, when the agreement for division was made, that he had a life estate in the fund to the amount of his agreed annuity; that, owing to the death of William E. Waring, he had a reversionary interest in one-half of the *corpus* of the personal estate, and a possible reversionary interest in the other half dependent upon his surviving Katherine G. Secor. His life interest he held under the trust agreement, and this he could not alien or dispose of in any way. His reversionary interest in the *corpus* of the estate he did not hold under the trust agreement, but held it, if at all, because it was not provided for by that agreement. This interest was his own, to do with as he pleased. He could sell it, or give it away. What he did was to actively co-operate and concur in its distribution between Katherine G. Secor and Fredericka W. Waring, and, by his act in so doing, he induced the defendant to make or consent to the distribution of the trust. In signing the agreement for division, he, in effect, gave away, not his inalienable life estate, but his remainder or reversionary interest in the fund, with which he had the right to deal as he saw fit. Under these circumstances he would not have had in his lifetime, nor has his executor now, any standing in a court of equity to repudiate the agreement for

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division and attempt to undo that to which he bound himself and induced others to become bound. Steinway v. Steinway, 24 App. Div. 104; Evans v. Benyon, L. R. (37 Ch. Div.) 329. The defendant is entitled to a judgment dismissing the complaint upon the merits, with costs and an extra allowance of $250.

Complaint dismissed, with costs.

JAMES P. TILLEY et al., Plaintiffs, *v.* SAMUEL D. COYKENDALL, Defendant.

(Supreme Court, New York Special Term, May, 1901.)

Equity — Action to charge a judgment, against a corporation for a tort, upon a person as being in fact the corporation — Demurrer to complaint.

Persons who have recovered in another court but have failed to collect a judgment against a corporation based upon its negligence in managing its towboat cannot in equity charge the judgment upon one whom they allege was "the company" at the time of the tort by virtue of his being the sole owner and who as they allege defended the action by an attorney of his own selection.

Semble, that an action at law might be brought against the present defendant for the same negligence and that upon that question, as well as upon the question of damages, the judgment in the other court could be used as conclusive evidence against the defendant upon proof of his interest and participation in the other action.

DEMURRER to complaint.

Hyland & Zabriskie, for plaintiffs.

Amos Van Etten, for defendant.

SCOTT, J. The plaintiffs, on December 2, 1898, obtained judgment for damages for a tort against a corporation known as the Beverwyck Towing Company, sued as the owner of a tugboat known as the "Syracuse." This judgment having been finally affirmed on appeal, executions were issued, which were returned

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unsatisfied. Plaintiffs now allege, in effect, that, at the time of the commission of the tort, and at the time of the recovery of the judgment, "Samuel D. Coykendall was doing business under the name of the Beverwyck Towing Company, and was the sole owner of all its stock, bonds, vessels and other property, having purchased and subsequently paid for the same with his own money. That he was in sole possession of all its vessels, operating the same for his own benefit and gain. That he did not pretend to keep up the corporate organization of said company, by election of officers, directors, etc., and indeed could not have done so as he alone owned all the stock. In a word, he was the company."

The foregoing statement of the status of the present defendant, with reference to the towing company, is taken from the plaintiffs' brief, and may, therefore, be accepted as accurately stating the plaintiffs' contention in that behalf. The plaintiffs further allege that the summons in the action against the towing company was served upon the defendant herein, upon the supposition that he was the president of said company, and that he defended the action and prosecuted the appeals therein (although in the name of the Beverwyck Towing Company) by an attorney of his own selection. The purpose of this action, which is brought on the equity side of the court, is to charge the defendant personally with the payment of the judgment against the towing company. This relief is sought, not because the defendant is a stockholder, even the sole stockholder, of the towing company, not upon the theory that the defendant holds the property of the company as trustee of the company for the benefit of its creditors, but solely upon the ground that he is, in fact, the company, or, in other words, the real owner of the towboat which did the damage, and the real employer of the servant whose negligence led to the accident. If this contention is true and sustained by the facts in the case, the plaintiffs had, and perhaps still have, a right of action at law against the defendant upon the same ground upon which they sued the company. The most that can be said is that they, by mistake or owing to misinformation, sued the wrong party. It is not apparent, however, that they are entitled to equitable relief. Reliance is placed upon cases which are authority for the proposition that a judgment or decree may, under certain circumstances, operate as *res adjudicata* against persons not formally parties to the record. Louisville & Nashville R. R. Co. v.

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Schmidt, 117 U. S. 230; B. & O. Tel. Co. v. Interstate Tel. Co., 54 Fed. Repr. 51. Neither of these cases, however, is authority for the maintenance of a suit in equity for the recovery of damages for tort. The one case was an action to reach specific funds, pledged to the payment of interest upon bonds, which funds thus impressed with a lien had come into the hands of the plaintiff in error. The other was a suit in the nature of a creditor's action, wherein it was sought to follow into the hands of the railroad company moneys which, in equity, were applicable to the debts of the telegraph company, taken by the railroad company with knowledge of the equitable claims thereon. 54 Fed. Repr. 55. As has been said, it is not contended in the present case that the defendant holds property of the towing company as trustee, either for it or its creditors, which ought to be applied to the payment of the company's debts, but the claim is, that there was no company in fact, and that the defendant himself was the owner of the tow-boat, and the employer of the negligent servant. To maintain the action, therefore, the plaintiffs should have alleged, as they did in the action in the City Court, negligence by defendant's servants in the handling of the tow. Possibly in such a case the judgment in the City Court might have been used as conclusive evidence against the defendant upon the question of negligence on the part of his servants, and upon the question as to the amount of damages, if plaintiffs could show that defendant, although not a nominal party to the City Court action, defended it by employing counsel, paying costs and expenses, procuring witnesses and doing those things which are usually done by a party. The authorities on which plaintiffs rely and many others which might be cited, go no further than this. But even if the judgment could be used as evidence of a fact necessary to be proven in order to establish the defendant's liability, the complaint to be sufficient must allege the existence of the fact. This it fails to do.

The demurrer must be sustained, with costs, with leave to plaintiffs to amend on payment of costs within twenty days.

Demurrer sustained, with costs, with leave to plaintiffs to amend on payment of costs within twenty days.

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Matter of the Application of ELIZA B. SMALLWOOD for Mandamus against the Comptroller of the City of New York, and the Deputy Collector of Assessments and Arrears for the Borough of Queens.

(Supreme Court, Queens Special Term, May, 1901.)

Tax — Interest on, where a New York city assessment is reviewed by certiorari and reduced — Liability of city to refund — L. 1896, ch. 908, §§ 251, 253, 256.

The allowance of a writ of certiorari to review an assessment of real property located in the city of New York for alleged overvaluation, inequality and illegality does not excuse the relator from timely payment of the tax, and therefore where she delays payment for more than a year and until the court has reduced her assessment she must pay interest on the true amount of taxes due, and this because of the provision of the charter of the city of New York (L. 1897, ch. 378, § 916), declaring that interest shall be paid on taxes remaining unpaid on the first day of January following the imposition of the tax.

***Semble* that, in such case, the city is liable to refund, with interest, so much of the tax paid as represented an excessive assessment.**

APPLICATION for a writ of mandamus.

Blackwell Brothers (George E. Blackwell, of counsel), for relator.

John Whalen, corporation counsel (George S. Coleman, of counsel), for respondents.

GARRETSON, J. The relator was the owner of real estate in the borough of Queens, in the city of New York, which was assessed for taxation for the year 1899. On the eleventh day of July, in that year, she instituted a proceeding by certiorari under the Tax Law (Laws of 1896, chap. 908, art. XI, § 250 *et seq.*), to review the assessment upon the grounds of overvaluation, inequality and illegality, and thereafter in July, 1900, an order was made reducing the valuation complained of and directing that the tax extended against the original assessment should be cor-

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rected in accordance with the reduced assessment and should be extended against the property on the basis of the corrected assessment. On the date of the entry of the order the amount of the tax as reduced was tendered by the relator to the deputy collector of assessments and arrears in the borough of Queens without interest, and was refused by him upon the claim and ground that the amount tendered was insufficient, for the reason that the interest — the penalty for delay in payment — had accrued thereon.

The tax levy in the city of New York for the year 1899, was confirmed prior to the first day of October, 1899. By section 916 of the charter (Laws of 1897, chap. 378), taxes remaining unpaid after the first day of January, succeeding the imposition of the tax, draw interest at the rate of seven per cent. per annum, to be calculated from the day on which the assessment-rolls and warrants are delivered to the receiver of taxes.

The relator now asks that a writ of mandamus issue to require the defendants to receive and accept the taxes extended against the corrected assessment without any charge for interest or penalties. She contends that the original assessment having been adjudged unlawful and a new and corrected assessment made by order of the court, no interest had accrued upon the taxes extended against the corrected assessment which was made coincidently with the tender of payment, and that there was no way by which she could have discharged the amount which was justly leviable upon the property prior to the entry of the order.

Whatever may have been the views heretofore entertained favoring the relator's contention, a careful examination of the question as presented hereon by the oral and written arguments of counsel, leads to the conclusion that such contention cannot be sustained.

That a proceeding to review an assessment for the purpose of taxation by certiorari shall not suspend the collection of taxes imposed to the possible embarrassment and disadvantage of the government and its political subdivisions and agencies, is fairly implied from the Tax Law itself, wherein it is provided that: "The allowance of the writ shall not stay the proceedings of the assessors, or other persons to whom it is directed, or to whom the assessment is delivered to be acted upon according to law." § 251.

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The act of 1880 (chap. 269), which was repealed by the Tax Law, and for which the latter codification and revision is a substitute, contained the same provision, and in language almost identical. § 2. In a proceeding brought thereunder for overvaluation, the order allowing the writ, stayed the collection of forty per cent. of the tax imposed upon the relator in consequence of the assessment, and it was said upon appeal therefrom (Daniels, J., writing): "This stay was entirely without authority, for, as the writ was issued under the act of 1880, it was subject to all the restraints mentioned in that act. And one of those restraints is that declared by section 2 of the act, that 'a writ of *certiorari*, allowed under this act, shall not stay the proceedings of assessors or other persons to whom it is directed, or to whom the assessment-roll may be delivered, to be acted upon according to law.'" People ex rel. Manhattan R. Co. v. Coleman, 48 Hun, 602. It is also stated in the Tax Law (§ 253), that: "A new assessment or correction of an assessment * * * shall have the same force and effect as if it had been so made by the proper officers within the time prescribed by law for making such assessment."

Counsel have not cited, nor has independent search disclosed any provision of law relieving a person assessed and taxed from the payment of the interest penalty in case the amount of the tax is reduced by order of the court on certiorari. Section 256 of the Tax Law expressly provides that there shall be a refund of a tax paid upon an illegal, erroneous, or unequal assessment; that there shall be audited and allowed to the petitioner, and included in the tax levy next after the entry of the order, and paid to the petitioner, the amount paid by him in excess of what the tax would have been if the assessment had been made as determined by the order, together with interest thereon from the time of payment. While the language of the section would seem not to be strictly applicable to the system of government established for the city by the Greater New York charter, in that it contemplates an audit by "the board of supervisors," it clearly recognizes a municipal liability to refund, and creates an obligation so to do. A recognition of such obligation was practically made by the former municipality, the mayor, aldermen and commonalty of the city of New York, which (as appears by the agreed statement of facts submitted hereon), had, from 1880, to

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the date of consolidation, refunded such excess of taxes with interest, in accordance with the intent if not with the terms of section 8 of chapter 269 of the Laws of 1880, which section is also a substantial re-enactment of section 256 of the Tax Law last above cited. It was also said in the case of People ex rel. Manhattan R. Co. v. Coleman, *supra:* "The order further provided that a stipulation should be entered into on behalf of the respondents for the return to the relator of so much of the money as was directed to be paid as the condition of the stay in case it should, in the end, exceed the tax which the relator was liable to pay. By section 8 of chapter 269 of the Laws of 1880, the proceeding has been provided for and defined, through which the return of any excess of payment shall be obtained, and that proceeding, as the act has created and defined it, seems to be exclusive."

That payment of a tax upon an assessment afterwards adjudged to be excessive and unequal, would not be deemed voluntary, and would be recoverable under section 256 of the Tax Law, as well as upon general principles of law, is inferable from the opinion of the Court of Appeals in People ex rel. Warren v. Carter, 119 N. Y. 557, in which it is said: "Where, however, one pays taxes imposed under an assessment which is not void, but simply excessive, and unequal, and gives notice of his proceedings to review and correct the same, thus indicating that he intends to reserve his rights and does not intend to waive or abandon his proceedings, we know of no principle of law upon which such a payment under protest can be set up as a bar to the further prosecution of the proceedings. By such payment he waives no rights, and does no wrong and creates no embarrassment to the municipality or officer taking his money, and he cannot be estopped thereby." The court also referred to the provisions of section 8 of the act of 1880, and said that the direction in the judgment in the proceeding that there should be audited and allowed to the relator the amount of taxes paid upon the erroneous assessment with interest from the date of payment was "in strict conformity with the statute and not subject to any just complaint." The motion must be denied, but without costs.

Motion denied, without costs.

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Matter of the Estate of JOHN M. FOULDS, Deceased.

(Surrogate's Court, New York County, May, 1901.)

Executor and administrator — Rent accruing before the death of the intestate goes to the administrator — Payments on realty improperly paid out of personalty.

Rent which accrued to an intestate before his death passes to his administrator and the latter may sell the claim for it.

Taxes and assessments on, interest on mortgages against, insurance premiums upon, and repairs to, real estate of an intestate cannot lawfully be paid by the administrator out of the personalty as against the next of kin, even though he and they are tenants in common of the said real estate.

PROCEEDINGS upon the judicial settlement of the accounts of administrators.

Andrew Foulds, Jr., for administrators.

William F. MacRae, for objectors.

THOMAS, S. The claim against John C. Smith for rent of the Passaic house accrued and was fully due during the lifetime of the intestate. The undivided interest of the intestate in this claim was, therefore, a personal asset which could be sold by the administrators. The sale appears to have been made after due notice and in good faith, and the amount received, though small, is not shown to be inadequate. The report of the referee approving of this is affirmed. The acting administrator and his brother were tenants in common with the intestate in certain real property in New Jersey. The next of kin, entitled to the personalty of the intestate, were also his heirs-at-law, and as such acquired interests in such real estate. Taxes and assessments upon this real estate, interest on mortgages upon it and insurance premiums on policies of insurance upon it were paid by the acting administrator. He also paid certain sums for repairs on a house. All of these disbursements are set forth in the account and the next of kin are sought to be charged, out of their respective

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interests as next of kin in the personalty, for their equitable shares as heirs-at-law of such expenses. It is quite clear that, independent of other facts, these payments were not such as an administrator could lawfully make and that they each of them constituted a breach of trust. Matter of Selleck, 111 N. Y. 284, 287. As to Mrs. McArthur, they may be allowed, for she was an administratrix and joined in the account and has not excepted to the report of the referee allowing them. As to Mrs. Wilson, the payments for taxes, assessments and interest on mortgages on the real property of the deceased which became due and payable after his death and prior to October 9, 1900, may be allowed because of her stipulation in writing of that date consenting thereto, and upon the faith of which payment was thereafter made by the acting administrator to himself and his brother in reimbursement for payments by them therefor. The whole transaction constituted an estoppel of Mrs. Wilson to this extent. Perry Trusts, §§ 849, 850. Payments for amounts which became due after that date are disallowed. For a similar reason Mr. Andrew R. Foulds is estopped from objecting to such payments for taxes, assessments and interest which were payable on or prior to July 19, 1900, that being the date of a letter from him on the subject, and the meaning of the language of the letter being made more distinct by uncontradicted evidence of contemporaneous conversations with him. Mrs. McIntyre consistently refused to make any consent on the subject, and all the payments must be disallowed as to her. The repairs on the Rutherford house were not made under any contract with the decedent, and the finding of the referee to the contrary must be reversed. The only evidence offered on the subject was clearly incompetent and properly excluded. No consent or waiver was given or made by any of the objecting next of kin to any payments for such repairs, and they must, therefore, be disallowed as against each of them. The objections to payments for services rendered to the administrators by their counsel are overruled. The administrators will be allowed commissions and costs for preparing the account; the disbursements of the accounting, including the fees of the referee and the stenographer, will be paid out of the estate. No other costs will be allowed.

Decreed accordingly.

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Matter of the Proceedings to Sell the Real Estate of Marvin W. Liddle, Deceased, to Pay Debts.

(Surrogate's Court, Washington County, May, 1901.)

Exemption — Realty purchased with pension money not exempt from the pensioner's debts after his death — Code C. P., § 1395 — Services rendered to a decedent in the family relation.

The exemption afforded real property, purchased with pension money, from levy and sale for payment of debts does not extend beyond the life of the pensioner; and therefore where he dies leaving such real property as the only fund for the payment of his debts and his will directs their payment, the real property may be sold to pay them.

Claims against a decedent's estate made by relatives for services rendered him in the family relation must be clearly established in order to be allowed payment.

Proceeding by Emeline Liddle, executrix of the last will and testament of Marvin W. Liddle, deceased, to sell the real estate of testator to pay debts.

Brodie G. Higley, for executrix.

Frank H. Mason, for claimants.

George Scott, for contestant.

Davis, S. This is a proceeding instituted by Emeline Liddle, the executrix of the last will and testament of Marvin W. Liddle, deceased, to sell the real estate of the testator to pay debts. On the return of the citation Frances J. Liddle, the widow of the testator, and who is the sole beneficiary named in the will, filed an answer to the petition, denying the validity of the claims, or some of them, and also alleging that the real estate of the decedent was purchased with pension money, and is, therefore, under section 1393 of the Code of Civil Procedure, exempt from sale for the payments of debts, and moves to have the proceeding dismissed.

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It is conceded that the real estate (which it is alleged is worth about $600) was purchased entirely with pension moneys, and that there was no personal property in the estate except that set off to the widow by the appraisers, under the statute.

The petitioner replies to the answer by setting up the will (which is entirely in manuscript, although not written by the testator himself), in which the testator expressly directs the payment of all his debts. It is claimed by this clause in the will that the testator waived and cancelled the exemption.

On the other hand the contestant contends that the clause in the will did not cancel the exemption, as it is not in compliance with section 1404 of the Code, which section provides the only way in which an exemption can be cancelled.

The question before us for decision then is, does the exemption from debts of property purchased with pension moneys extend beyond the decease of the pensioner? As is usual in cases of this character the sympathies are with the contestant, but in legal proceedings sympathy must yield to the superior claims of justice and equity.

At common law all property is liable for debts and for taxes, and no property is exempt except as some statute specially so provides. It will be observed that there is no statute that exempts from debts real estate purchased with pension moneys. Section 1393 of the Code, on which the contestant in this proceeding relies, exempts only the pension money. In the case of Yates County Bank v. Carpenter, 119 N. Y. 550, the Court of Appeals held that where the pension money can be directly traced to the purchase of property necessary for the support of the pensioner and his family, such property is exempt from levy and sale under an execution. In the case just cited the pensioner secured an order from the County Court restraining the bank from selling his real estate on an execution, and the Court of Appeals sustained the order.

The case of Buffum v. Foster, 77 Hun, 27, also cited by contestant, was an injunction to restrain the sale of real estate purchased with pension money. The General Term held that the injunction was properly granted.

Both of the proceedings in the two cases just cited were had during the lifetime of the pensioner, and neither of the cases decides that the exemption extended beyond the lifetime of the

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pensioner. That question was not before the court in either case.

The industrious and able counsel for the contestant cites us no case that holds that real estate purchased with pension money is exempt from debts after the decease of the pensioner.

The case most nearly approaching the doctrine contended for by the contestant's counsel is Hodge v. Leaning, 2 Dem. 553, in which the surrogate of Otsego county held that pension money in the hands of an executor constituted no part of the assets of the decedent's estate, and hence was not liable for decedent's debts; but that decision was disapproved in the case of Beecher v. Barber, 6 Dem. 129, where the surrogate of Chenango county refused to follow it, and decided directly the opposite, and holding that on a final judicial settlement pension money in the hands of the executor was assets, and liable for decedent's debts.

This must be so upon principle. It is easy to see how absurd and unjust results and hardships would follow, if the doctrine contended for by the contestant's counsel in this case was maintained. A pensioner might die, leaving an estate worth $3,000 in pension money, or in property purchased with pension money, and at the same time owing $500 in just debts. If contestant's doctrine is to be sustained the creditors must lose their debts, although the estate is ample to pay them. Indeed, if such were the law, a pensioner might have to be buried at public expense, or by the charity of his friends. Clearly neither the Legislature by its enactments, nor courts by their decisions, ever intended any such results. They have shown great liberality and justice towards the soldier and his family, but have not gone to the lengths contended for by the contestant in this case. It is unthinkable that the pensioner in this case intended to so fix his property that his just debts — expenses of his last sickness and burial — should not be paid out of his estate. Being a pensioner, he doubtless knew what exemptions might be claimed for his estate, and for that reason had the clause directing the payment of his debts inserted in his will so as to avoid the very results here threatened. Ordinarily it may be true, as argued by the counsel, that the clause in a will directing payment of debts is merely formal, and practically means nothing, for the just debts of a decedent under ordinary circumstances must be paid if there is property, whether the will so directs, or not. It is further con-

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tended in this case that notwithstanding the clause in the will directing payment of debts, the executrix has no power to sell the real estate, and apply the proceeds to their payment, and cites Matter of City of Rochester, 110 N. Y. 159.

It is true that the mere formal direction in a will to pay debts does not *per se* give an executor power upon his own motion to sell the real estate of his testator, give an executor's deed, and apply the proceeds to the payment of decedent's debts. In such a case the creditor must resort to the usual statutory proceeding to enforce the payment of his claim. The executrix in this case has not attempted to sell the real estate except upon the decree of the court. There is nothing in this proceeding in conflict with what was decided in Matter of City of Rochester, *supra*. It is immaterial with the executrix here whether these claims are paid, or not. The several claims as filed are in due form, and upon their face apparently valid. They are objected to by the widow, who is the sole beneficiary in the will, so this contest is really between the creditors and the widow.

The object of the executrix in this proceeding is to obtain a decision of the court as to the validity of these claims, and as to the liability of the estate to pay them if declared valid, and a decree granted directing their payment, to the end that upon the final judicial settlement of the estate her account may not be surcharged for the payment of debts that are invalid, nor involve the estate in litigation for refusing to pay claims that are valid.

Of the several claims filed with the executrix against the estate, four are objected to and contested, to-wit: Warren Coomer, $15; Addie E. Mabee, $24; Elizabeth Carter, $56.58; Sarah J. Monroe, $259.

Two of these claimants are sisters; one a niece; the other a nephew of the decedent. The greater portion of these claims is for taking care of decedent in his last sickness, and for services rendered as housekeeper for decedent in former years. The rule in regard to such claims is too well settled to require the citing of authorities, that claims against the estate of a deceased person made by near relatives for personal services rendered in the last sickness, and for domestic services in the deceased's household, are to be regarded with suspicion, and require stronger proof to establish them than ordinary claims made by strangers.

A large amount of testimony was taken in relation to the

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validity of these claims, and without discussing the testimony in detail as it relates to the several items, I think the proof is insufficient under the law to establish them all as legal claims against the estate. The claim of Warren Coomer is rejected; the affidavit attached to that claim as filed is fatally defective in that it does not conform to the statutory requirements, and the proof in relation to this claim does not cure the defect in the affidavit, nor establish the claim.

The claim of Addie E. Mabee is allowed to the extent of $14; Sarah J. Monroe in the sum of $16, and Elizabeth Carter's claim of $56.58 is allowed in full, with interest upon the several claims as allowed.

Contestant's motion to dismiss the proceeding is denied.

Counsel for the executrix may prepare and submit a proposed form of decree in accordance with this opinion.

Decreed accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* SIGISMUND HERTZ, Defendant.

(Court of General Sessions of the Peace in and for the County of New York, May, 1901.)

Crimes — Description of a forged check according to its tenor — Rejection of surplus allegations as to its substance.

An indictment for forgery in the second degree, otherwise sufficient, which, in describing the instrument forged and uttered, alleges "which said forged instrument and writing in substance is as follows, that is to say:

'New York.....1900.

The Chemical National Bank Pay to Samuel W. Levey, or order, forty-one 78/100.

$41.78/100. Stiefel, Sachs & Company.'

a more particular description whereof is to the Grand Jury aforesaid unknown" is sufficient as containing a plain and concise statement of the act constituting the crime and the instrument is to be deemed to have been pleaded according to its tenor.

The words "in substance" and "a more particular description whereof is to the Grand Jury aforesaid unknown" are to be rejected

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as surplusage, and hence the rule that, where the substance may be pleaded because of a disabling cause that cause must be pleaded as an excuse for not pleading the tenor, has no application.

DEMURRER to indictment for forgery in the second degree.

Levy & Unger, for demurrer.

Eugene A. Philbin, District Attorney, for indictment.

GOFF, R. The indictment is demurred to on the ground that it does not state facts sufficient to constitute a crime. What are the facts stated? In the first count (1) that on the 7th day of December, 1900, defendant, with intent to defraud (2) feloniously forged a certain writing (which is described). In the second count (1) that defendant with intent to defraud (2) feloniously uttered the forged instrument set forth in the first count (3) knowing the same to be forged. The two allegations of fact charging forgery in the first count or the three allegations of fact charging uttering in the second count are in either case sufficient to constitute a crime unless the description of the forged instrument is so indefinite and uncertain as to leave in doubt the question of law, is the false writing described susceptible of forgery? The point of the demurrer lies in the criticism of this description, which reads "which said forged instrument and writing in substance is as follows, that is to say:

'NEW YORK, ... 1900.

'The Chemical National Bank Pay to Samuel W. Levey, or order, forty-one 78/100.

'$41.78/100. STIEFEL, SACHS & COMPANY.'

"a more particular description whereof is to the Grand Jury aforesaid unknown."

It is contended that in this description the forged instrument (1) is not set forth according to its tenor; (2) that it is pleaded in substance; (3) that being so there is not sufficient averment in excuse for so pleading it.

The rules of pleading at common law are invoked to sustain this contention. These rules, as far as applicable, may be briefly summarized:

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First. That if the forged writing be in the possession of the prosecutor it must be set forth in the indictment according to its tenor in words and figures.

Second. That if the writing be lost or destroyed or in the possession of the defendant it will be sufficient to plead its substance and effect.

Third. In such case the disabling cause must be pleaded as an excuse for not setting forth the instrument in exact words and figures. 1 Bish. Crim. Pro., § 561; 2 id., §§ 403, 404; 1 Whart. Crim Law (8th ed.), §§ 167–176; 2 Waterman's Arch. Cr. Pl. & Pr. 801; Heard. Prin. Crim. Pl. 202–204.

Applying the test of these rules to the indictment: Its averment is "which said forged instrument and writing *in substance is as follows, that is to say,*" and then the instrument is set forth in words and figures. The pleader professes to plead the *substance,* while in fact he pleads the *tenor* of the instrument. Eliminate the words "in substance" and the averment will read "which said forged instrument and writing is as follows," etc. If this were the form of expression it could not be held obnoxious to the first rule cited, for it sets forth the tenor of the instrument in words and figures. Do the qualifying words "in substance" impair the force of particulars?

But it is claimed that the pleader professing to give the substance of the instrument is bound to plead the excuse for not giving its tenor, and that the subsequent statement, "a more particular description whereof is to the Grand Jury unknown," is wholly insufficient as an excuse. This undoubtedly would be true if the *substance* of the instrument was in fact pleaded, but when its tenor is pleaded, which necessarily embraces the substance, it is not necessary to plead excuse for an omission which does not exist.

It is manifest that the insertion of the words "in substance" is a redundancy, and in consequence that the subsequent statement "a more particular description whereof is to the Grand Jury unknown" is surplusage. Whether under the strict rules of common-law pleading this redundancy and surplusage would render the indictment fatally defective need not now be determined, since its sufficiency must be tested in the first instance by the rules of the Criminal Code. It is provided by section 273 of the Code that "Hereafter the forms of pleading, and the rules

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by which the sufficiency of pleadings is to be determined, are those prescribed by this Code."

These rules may be epitomized:

First. That the indictment shall contain a plain and concise statement of the act constituting the crime, without unnecessary repetition. § 275.

Second. That it is sufficient if the act charged as the crime is plainly and concisely set forth. § 284, subd. 6.

Third. That the act charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction. § 284, subd. 7.

Fourth. That it cannot be affected by reason of an imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits. § 285.

Fifth. That it is not rendered invalid by an error or mistake therein, unless it have actually prejudiced the defendant or tend to his prejudice in respect to a substantial right. § 684.

These rules were interpreted by Judge Earl in People v. Laurence, 137 N. Y. 521, where he says: "Hence, the technical rules which in ancient times frequently served a useful purpose have been greatly relaxed, indeed, almost entirely abrogated. By our Code of Criminal Procedure all forms of pleadings in criminal actions before existing were abolished, and the sole requisite of an indictment, besides the formal parts, is that it shall contain 'a plain and concise statement of the act constituting the crime, without unnecessary repetition.'"

At common law it was required that in an indictment charging larceny of money it should be alleged that it was lawful money of the realm. In People v. Spencer, 27 Misc. Rep. 494, the indictment charged defendant with the larceny of money, but did not allege that it was lawful money of the United States. The court, in sustaining the indictment, said: "If it can be understood from the indictment that the act constituting the crime is plainly and concisely set forth and with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case, the indictment is sufficient."

In Rosekrans v. People, 3 Hun, 287, the indictment was for forgery, and it contained these words, "is in writing and is in substance to the effect following, that is to say." On demurrer the indictment was held sufficient, as setting forth facts sufficient

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to constitute a crime, though the precise question was not discussed in the opinion.

In People v. Kingsley, 2 Cow. 522, the indictment was for forgery of an instrument which was alleged to be in the possession of the defendant, and, therefore, could not be set forth according to its tenor. The court, while declaring the general rule to be "that the instrument forged must be set forth with particularity and certainty," held it not applicable to the present case because "the indictment excuses the want of a more particular description by averring that the bond was with the defendant." Though this case was decided before the adoption of the Code, the rule enunciated was and is undoubtedly the law. The facts of the two cases differ. In the Kingsley case the indictment alleged the substance only because the instrument was in the defendant's possession, while in the case at bar the indictment it is true says "in substance," but in fact sets forth a written instrument in words and figures.

The case of People v. Dumar, 106 N. Y. 502, is not an authority in point. There the indictment alleged one crime, while the evidence on the trial proved the commission of a different crime, and the Court of Appeals held the indictment insufficient to sustain the conviction upon the evidence, saying, "The general principle of pleading has not been substantially changed. Under either system (Code or common law), an offense consists of certain acts done * * * and under neither is any indictment sufficient which does not accurately and clearly allege all the ingredients of which the offense is composed."

An essential of criminal pleading defined by the Code as "a plain and concise statement of the acts constituting the crime" was violated in the Dumar case. Here the essential is preserved. The crime charged is forgery. Forgery is defined by the Penal Code (§ 511), as "forging with intent to defraud, an instrument or writing, being or purporting to be the act of another, by which a pecuniary demand or obligation is or purports to be or to have been created, increased, discharged or diminished."

Blackstone defines forgery as the fraudulent making of a writing to the prejudice of another's rights. Does the indictment contain a plain and concise statement of the act constituting this crime? It charges that the defendant, with intent to defraud, feloniously forged an order purporting to be drawn by Stiefel,

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Sachs & Company upon the Chemical Bank to pay forty-one dollars to Samuel W. Levey, or order. There is nothing uncertain about this accusation. The defendant is fully apprised of the charge against him. The issues of fact to be tried are clearly defined. The defendant, if convicted, is protected against another prosecution for the same offense. His substantial rights are in no sense prejudiced, and the court is enabled to pronounce judgment according to the right of the case.

The precise question here was presented to the Supreme Court of Iowa, in State v. Johnson, 26 Iowa, 407, and in an elaborate opinion the court held, that where an indictment for forgery alleged that the instrument "is of the purport and effect following," and then set forth a copy of the instrument, it was not vitiated by the insertion of the superfluous words "is of the purport and effect following."

I am, therefore, of opinion that the words "in substance" and the words "a more particular description whereof is to the Grand Jury unknown" may be rejected as redundancy and surplusage respectively, without in any sense impairing the value of the pleading or prejudicing the rights of the defendant. People v. Laurence, 137 N. Y. 517; People v. Lowndes, 130 id. 463; People v. Buddensieck, 5 N. Y. Crim. 69.

Demurrer disallowed.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* BENJAMIN D. HART, Defendant.

(Court of General Sessions of the Peace in and for the County of New York, May, 1901.)

Crimes — In larceny by false pretense, the pretense must relate to some past or existing fact — Demurrer — Penal Code, § 528.

An indictment for larceny by false pretenses, alleged to have induced the complainant to part with his saloon, stock and fixtures to the defendant for $200 and his worthless note, which states the false pretenses as consisting in the defendant's falsely pretending that he was "desirous" of owning saloons, that he was "desirous" of purchasing the saloon in question, that he owned two houses and lots, that he did not have the money to pay for the saloon and was "desir-

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ous" of paying for it partly in cash and partly by his note, that a certain memorandum in writing exhibited and presented by him was a valid lien on the houses and lots and prevented their sale until the note was paid, is demurrable as containing no false pretenses relating to a past or existing fact, except that relating to the ownership of the two houses and lots; and where the indictment shows that such ownership was not the cause which induced the complainant to part with his saloon, the demurrer must be sustained.

DEMURRER to indictment for grand larceny by means of false pretenses, on the ground that the facts stated do not constitute a crime.

P. A. McManus, for demurrer.

Eugene A. Philbin, District Attorney, for indictment.

GOFF, R. Taking as a premise the rule of pleading that the indictment must contain a plain and concise statement of the acts constituting the crime (Crim. Code, § 275), it becomes necessary in the first instance to determine what are the acts which constitute the crime of larceny by false pretense.

Obtaining property by a fraud which did not amount to a defined felony was not an indictable offense at common law, unless it affected the public. It was said by Lord Mansfield that "an offense to be indictable must be such an one as affects the public." Fraud by a false token designed to cheat only the individual was not indictable. It had to be a fraud by a false token designed to cheat the public generally — such as false weights and measures. To protect the individual it was declared by 33 Henry VIII that fraud upon the person by means of privy tokens was a misdemeanor. But this statute was found to be inadequate, as it did not reach a fraud by verbal false pretense where no real or visible token was used.

The statute against false pretenses was then enacted (30 Geo. II, chap. 24), which declared that "all persons who knowingly and designedly by false pretense or pretenses obtained from any person money or goods, wares or merchandise, with intent to cheat and defraud, should be deemed offenders against law." By

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this statute a new offense was created, and its principles have been incorporated into later English legislation and into the laws of our own State, which is contained in section 528 of the Penal Code. This section reads: "A person who, with the intent to * * * defraud the true owner of his property * * * obtains from such (his) possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing * * * Steals such property, and is guilty of larceny." Though the statute by words calls the crime larceny, it does not change the essentials of the substantive crime of fraud by false pretense, nor does it alter the rules of pleading it. People v. Dumar, 106 N. Y. 509; Loomis v. People, 67 id. 329; People v. Jeffery, 14 N. Y. Supp. 839.

From an abundance of authorities these essentials may be deduced, as (1) an intent to defraud; (2) a false pretense with knowledge of its falsity; (3) a fraud committed by means of the false pretense, and (4) reliance on the false pretense by the person defrauded. 2 Bish. Crim. Pro., § 163; People v. Thompson, 1 Park. Crim. 501; Commonwealth v. Drew, 19 Pick. 179; People v. Haynes, 14 Wend. 546; Watson v. People, 87 N. Y. 564. Not only must these essentials be pleaded and the false pretenses negatived, but they must be proved as laid before a conviction can be had. 2 Bish. Crim. Pro., §§ 178–183; 2 Maule & Selwyn, 379. The "acts" constituting the crime are, therefore, the intent, the pretense, the fraud and the reliance, and these must be plainly set forth in the indictment. Crim. Code, § 275, *supra*. That the indictment correctly and sufficiently contains a statement of three of the "acts," intent, fraud and reliance, is not questioned, but that it fails to do so as to the "act" of false pretense is made the *crux* of the question raised by the demurrer.

An authoritative definition of a "false pretense" must be ascertained before applying it as a test to the assailed pleading. The term "false pretense," when used in a criminal statute, must be taken in its legal and not its literal sense, because in law it has a well-defined and appropriate meaning. State v. De Lay, 93 Mo. 98; Chapman v. State, 2 Head, 36. Roscoe says, in Criminal Evidence (7th ed., p. 478): "The false pretense laid in the indictment must be of some present existing fact, and not of some future event, or a mere promise." Bishop (2 Crim. Law, § 415) defines it as "Such a fraudulent representation of an existing or

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past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." The pretense must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property." Russ. Crimes, 81. "A false pretense to be within the statute must be the assertion of an existing fact, not a promise to perform some act in the future." Commonwealth v. Moore (Pa.), 3 Crim. L. Mag. 839; Commonwealth v. Drew, *supra.* "The pretense must relate to an existing or past fact." (People v. Johnson, 12 Johns. 292; People v. Tompkins, *supra;* Scott v. People, 62 Barb. 71), and "a false promise to do an act depends on a future event, and is not a false pretense." Ranney v. People, 22 N. Y. 414. "A promise is not a pretense" (People v. Williams, 4 Hill, 9), and "an opinion or profession of intention, even though thereby a fraud be committed, is not a false pretense." 2 Bish. Crim. Law, § 416; Martin v. State, 36 Tex. Crim. 125. To the same effect are numerous other authorities, but sufficient have been cited to firmly establish the rule that false pretense must relate to a past or present fact, and not to an opinion, promise or profession of purpose.

The "statement of acts" contained in the indictment which must be tested by this rule is, the defendant did "falsely and fraudulently pretend and represent that he was *desirous* of entering largely into the ownership and management of saloons and other places for the sale of liquor and for public entertainment, and that he was *desirous* of so beginning such business venture by the purchase of the liquor saloon, fixtures, stock, license, etc., of the value of two thousand five hundred dollars" — that he further falsely pretended and represented that he "was the owner and in possession of two houses and lots of land * * * that he was not then and there possessed of the ready money wherewith to pay the agreed purchase price of said saloon, * * * and was *desirous* of paying therefor by two hundred dollars cash and his certain note for the sum of twenty-three hundred dollars, payable in sixty days * * * and that a certain memorandum in writing * * * exhibited and presented by him * * * was a good and sufficient instrument subjecting and mortgaging the said two houses and lots of land * * * and a good and valid lien securing the payment of the (aforementioned) promissory note * * * and falsely pre-

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tended and represented that the said memorandum in writing * * * prevented and prohibited the sale, mortgaging and transfer of the said two houses and lots of land until the said promissory note * * * had been fully paid."

It is then alleged that believing said pretenses and representations the complainant was induced to and did part with his property. These allegations condensed are that the defendant was (1) "desirous" of owning saloons; (2) that he was "desirous" of purchasing the saloon of the complainant; (3) that he was the owner and in possession of two houses and lots of land; (4) that he did not have the money to pay for the saloon; (5) that he was "desirous" of "paying" therefor by part cash and his promissory note; (6) that a certain writing was a valid lien on the houses and lots as security for the payment of his note and prevented their sale until the note was paid.

Grouping these allegations, there are three of desires, one of impecuniosity, one of opinion on the legal effect of a writing, and one of ownership of land.

Each of the desires is legitimate. A man's "desires" for the acquisition of wealth or property may be boundless, and no law ever was or ever can be enacted which could limit their conception or expression. Such an emotion as "desire" cannot be measured by a penal statute, much less reduced to the concrete form of fact. How can a man's "desires" be proved? How can they when alleged be negatived? And yet this indictment negatives that which cannot be proven: "Whereas in fact the defendant was not desirous of entering into the ownership of saloons or desirous of beginning such business by the purchase of the saloon, * * * or desirous of paying for the saloon." If these averments were intended as allegations of fact they formed a constituent element of the offense charged, and consequently became material averments which would have to be proved upon the trial. Since material averments must be susceptible of proof, and the proof must coincide with the averments, and it being manifest that these averments are not susceptible of proof, and that no proof could be given which would coincide with them, it logically follows that they are immaterial and in no sense "a statement of the acts constituting the crime."

The contention that they may be taken as showing the evil mind of the accused does not enhance their value, as that quality

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of mind is adequately set forth in the allegation of intent to defraud, which is susceptible of proof by inference from the proven facts and circumstances. The allegation that he had not money to pay for the property is valueless. It is pleading evidence as distinguished from fact. Besides, it must be taken as true, since it is not negatived. The representations that the writing was a valid lien on the land and security for the payment of the note are not representations of past or existing facts. They are simply expressions of opinion on the quality and effect of a written instrument, and it having been "presented" to the complainant he was presumably as competent a judge of its sufficiency as the defendant. The assertion that the writing "prevented and prohibited the sale, mortgaging and transfer of the land" was an undertaking by the defendant not to sell or mortgage until the note was paid. This was a promise not to do certain things in the future, and as such invalid as a false pretense. There remains but one pretense to examine — that the defendant was the owner of certain land.

This is the one representation of an existing fact. Was it the inducing cause of the complainant parting with his property, or was it a statement as to the defendant's means and ability to pay for the property he had purchased. The indictment says that the complainant "did then deliver to the defendant the said saloon and property therein, and did then receive therefor from the defendant the sum of two hundred dollars in case, the said written statement (security) and the said promissory note." From this it is clear that the ownership of the land was not the inducing cause of the complainant parting with his property, but the cash and the note were.

The title and possession passed from the complainant, and he accepted in return part payment in cash and a promise to pay the balance. The principal obligation was the promise. The ownership of the land was incidental. True, the representation of ownership of the land accompanied the promise, but although the promise be coupled with the statement of an existing fact, yet if the property was obtained by relying on the promise the offense is not committed. People v. Thompson, *supra*.

Assume that the defendant did own the land. He could have sold or mortgaged it before the maturity of the note, and the complainant could not realize upon it. In such case the defend-

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ant would be guilty of breaking his promise, but he would not be guilty of false pretense. It has been pointed out that the representation by the defendant that the "written instrument" was a lien on the land did not amount to a false pretense. In People v. Gibbs, 98 Cal. 661, it was held that a representation that a mortgage on land was sufficient security for a note was a mere expression of opinion.

Since, therefore, the defendant was free to dispose of his land — if he owned it — without incurring the penalty for false pretense, the complainant could not be deprived of a security which he never possessed, and it follows that the representation of ownership was not the moving cause. This conclusion is borne out by the pleader, who, in his brief, says: "The allegation by the defendant of his ownership of the land is not made as a pretense by means of which a purchase of property was made, but in support of the false pretense that the 'writing' was a good and sufficient mortgage guaranteeing the payment of the note." It is conceded that the property was not sold to the defendant on the credit of his owning the land, and that if such were the case his representation would have to be in writing. § 544, Penal Code.

By the demurrer the facts are admitted, and from them it can be gathered that by falsehood and dishonest dealing the complainant was deprived of his property. But it is not every lie or dishonest or fraudulent act that comes within the purview of the criminal law, nor can it protect men from the consequences of their own credulity or folly. All moral delinquencies cannot be prevented or punished, and the only safe rule in the administration of criminal justice is to confine its application to those acts which the law expressly condemns.

This indictment does not contain a statement of the acts constituting the crime of larceny by false pretense, and I, therefore, allow the demurrer.

Demurrer allowed.

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* JOHN FULLER, Defendant.

(Court of General Sessions of the Peace in and for the County of New York, May, 1901.)

Crimes — Assignment of counsel on a charge of murder — Code Crim. Pro., § 308.

The court will not permit a destitute defendant, charged with murder in the first degree, to have any share in selecting the counsel to be assigned him by the court and paid by the county under Code Crim. Pro., § 308.

***Doubted,* whether under the statute the court can allow compensation to counsel assigned to such defendant after arraignment, or unless assigned upon arraignment.**

APPLICATION by the defendant, charged with murder in the first degree, for an assignment by the court, for his defense, of counsel selected by him.

Charles Sullivan and Martin Conlon for motion.

No other appearance.

FOSTER, J. This is an *ex parte* application by the defendant, who is charged with murder in its first degree, for the assignment by the court, for his defense, of counsel selected by him.

It has been the custom of our courts from time immemorial, when a defendant was without counsel, and without means, to assign some member of the bar to that important and honorable, though onerous, duty. Until the enactment of the law hereinafter referred to, there was no power in the court to order payment for the services, however meritorious and valuable, rendered on such assignment. People ex rel. Brown v. Board of Supervisors, 4 N. Y. Crim. 102; People ex rel. Ransom v. Board of Supervisors, 78 N. Y. 622. The injustice of this, both to the bar and the accused, was most apparent, though the duty thus imposed by the court upon counsel had invariably been ably and conscientiously discharged.

In 1897, the Legislature, by chapter 427 of the Session Laws, evidently recognizing this injustice, provided that where the

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crime charged against the defendant is punishable with death, counsel so assigned by the court *upon arraignment* may be paid his personal and incidental expenses and for his services not more than $500. Code Crim. Pro., § 308. It may well be doubted whether, under this statute, the court has any power to allow any compensation to counsel assigned to defendant *after arraignment*, or unless assigned *upon arraignment*.

This change in the law has, not unreasonably, caused the assignment in such cases to be eagerly sought for, and, in some instances, through means not above reproach. It seldom happens that a defendant is arraigned, charged with murder in its first degree, without many applications for such assignment being made to the judge before whom the arraignment is had, by counsel claiming previous retainer or especial familiarity with the case, or claiming to represent the wishes of the accused or his family, or some other equally cogent reason. It has, indeed, been a matter of common rumor that zealous "counsel" have sometimes offered to divide their prospective fees with the family and friends of the accused, in consideration of their inducing the accused to ask the court for their assignment as counsel!

The accused, in prison, and with a relatively limited acquaintance as to the capability and suitability of counsel, and oppressed, as he is, with the gravity of his situation, is often but poorly able to choose or recommend. It is the plain duty of the court to protect the defendant from such improper influences, and to permit him, under these circumstances, to suggest counsel to be assigned by the court, and *to be paid by the State*, is to open the door to such grave abuses that I am unwilling to encourage it. There is doubt whether a defendant able to retain and pay his own counsel will ever do so if he knows that upon his application the court will assign, and the State pay them! It follows, therefore, that if the court is to assign counsel, it should do so free from any prompting or suggestion whatsoever, either by the defendant or by counsel desiring such assignment. The defendant is wholly free to select his own counsel, but if the court is to assign, *and* the State is to pay, then the independent selection by the court, by removing the temptation, will prevent the improper solicitation of such assignments by means both despicable and unprofessional, and will, at the same time, permit the assignment in proper cases of counsel who are eminent, able and honorable.

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If, in an isolated case, this rule should possibly work hardship, it is clear to my mind that it will, in the end, result to the great advantage of the accused, the community and the bar.

I may add that no reflection is intended, nor entertained, as to the two counsel whom I am asked to assign in this particular case, and this memorandum is written that they may know why I deny this application, and that the bar may know my views for their future guidance.

Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* CHARLES NEIDHART, Defendant.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* JOHN WELSH, Defendant.

(Court of General Sessions of the Peace in and for the County of New York, May, 1901.)

Crimes — Resubmission to grand jury of a charge dismissed — Code Crim. Pro., § 270.

The power of the court to direct a dismissed criminal charge to be resubmitted to the grand jury should be sparingly exercised and will not be exercised where the affidavit of the district attorney merely states, without giving any facts, that he is of opinion that the grand jury misunderstood the law and that if the charge is resubmitted an indictment "may be found."

APPLICATION by the district attorney for leave to resubmit the charges against above defendants to the grand jury.

Eugene A. Philbin, District Attorney, for applications.

No other appearances.

FOSTER, J. These are applications by the district attorney for leave to resubmit the charges against these defendants to the grand jury. These charges have been passed upon by the February grand jury, which, after due hearing, dismissed them.

While the court has power to permit the charges to be again

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submitted to the grand jury (Code Crim. Pro., § 270), such power should be sparingly and discriminatingly used. It is a practice that ought not to be encouraged, nor granted *pro forma*. The court should act judicially, and permit such resubmission only when facts are presented which justify such action. No such facts are shown in these two applications. From these applications (and they are substantially similar) only the following in substance appears: That the charges referred to were duly submitted to the grand jury and by them duly dismissed. That deponent does not agree with the grand jury. That deponent is of the opinion that the grand jury misunderstood the law, and, if the charge is again submitted, an "indictment may be found." What are the facts which justify these opinions and beliefs? None of such facts are set forth in the affidavit or application. The application, therefore, does not appeal to judicial discretion, and cannot be granted.

So far as appears, the evidence against these defendants was fully brought to the attention of the grand jury, who may, in a manner, be said to represent the "common sense" or consensus of opinion of the entire community. If the facts so proven against these defendants did not appear to them of sufficient importance to justify any prosecution, there and then should be the end of the matter. Such I understand to be the policy and meaning of our law, and the *raison d'etre* of the grand jury. To permit the district attorney, because he does not agree with the grand jury (and seemingly for no other reason) to continue resubmitting complaints to other grand juries until one can be found to agree with him, is to place in his hands a power of persecution that I am unwilling to sanction, and which, I am quite sure, he does not desire. The verdict or decision of the grand jury is justly entitled to great weight, and should not be lightly brushed aside or ignored.

It may also be observed that the granting of such applications *as of course* minimizes the importance of the grand jury, and tends to encourage in them a careless and superficial examination of the matters submitted to them.

"*Interest rei publicæ ut sit finis litium*" is as true in the administration of the criminal law as it is in equity.

Applications denied.

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CHARLES MAAS, as Administrator of the Goods, Chattels and Credits of FRIEDA MAAS, Deceased, Respondent, *v.* THE GERMAN SAVINGS BANK IN THE CITY OF NEW YORK, Appellant.

(City Court of New York, General Term, May, 1901.)

Savings bank — Void payment to foreign administrator — Notice — Inquiry.

A domestic savings bank is not protected in paying a deposit to a deceased depositor's foreign administrator upon his production of a certified copy of his letters where a domestic administrator of the depositor had already been appointed, in the county where the savings bank was located, five months before the foreign administrator's appointment, as the presentation of the foreign letters put the bank on inquiry and required it to search the records of its own county at least for the appointment of a domestic administrator.

APPEAL from a judgment in favor of the plaintiff, entered upon findings of the justice at Trial Term.

E. B. & W. J. Amend (E. I. Spink, of counsel), for appellant.

Wensley & Gilroy, for respondent.

DELEHANTY, J. This action is to recover the amount of a deposit made by the plaintiff's intestate in her lifetime, with the defendant. The trial was had before the court, without a jury, upon a conceded state of facts, which shows the following:

On the 13th day of May, 1896, Frieda Maas opened the account in question, being then a resident of Hudson county, in the State of New Jersey, which residence was known to the defendant, and continued to there reside until her death, on November 15, 1898, intestate, leaving her surviving two minor children as her only next of kin. Letters of general guardianship of said minors were issued to the plaintiff by the surrogate of New York county on November 23, 1898, and subsequently, and on March 9, 1899, the said surrogate issued to the said plaintiff letters of administration of the goods, chattels and credits of said Frieda Maas, deceased. No notice of these respective appointments was given

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by the plaintiff to the defendant until August 26, 1899. On August 23, 1899, the surrogate of Hudson county, N. J., duly appointed one Frederick Maas as administrator of the goods, chattels and credits of the said decedent, Frieda Maas, and on the same day he duly qualified and presented to the defendant a certified copy of his letters, together with the pass-book issued to the decedent, demanded payment of the balance due thereon, which was thereupon paid him in his representative capacity. Three days later the plaintiff gave the bank notice of his appointment as guardian of the minors and also as administrator, demanded payment of said account, and two days later commenced this action.

It is conceded that the surrogates of New York county and Hudson county had jurisdiction to issue letters of administration as was done. The question before the trial justice, and now before us, is, was the payment to the foreign administrator, under the circumstances, such as discharged the defendant from further obligation in connection with this matter? The learned trial judge has decided adversely to the defendant on that proposition, and from the judgment entered upon his findings this appeal is taken.

The point involved is novel, as is shown by the sparsity of decisions touching the same. As a general proposition, it is well settled that a foreign administrator of the beneficiary of a fund deposited with a New York bank has power to demand payment of the bank, and, if payment is made, his discharge in his representative capacity would be effectual. Schluter v. Bowery Savings Bank, 117 N. Y. 125, 129, and authorities there cited. But does this rule apply in a case, as here, where there was at that time a domestic administrator? I think not. It is conceded that the plaintiff received his appointment by the surrogate of this county in March, 1899, while the New Jersey administrator was not appointed until the following August. It does not appear, however, that the plaintiff knew of the deposit in question prior to his demand for payment on August 26, 1899, nor is it material to the decision of this appeal. The fact is that when the bank made payment to the foreign administrator, the plaintiff had already been duly authorized by a court of competent jurisdiction in this county to administer the assets of the deceased found therein. The mere fact of the presentment of foreign letters

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was sufficient, I think, to put the defendant upon inquiry to discover whether our courts had yet acted in the matter. The duty imposed upon the bank was to exercise ordinary care in making over the deposit. It could have required the foreign administrator, as a condition precedent to payment, to apply for ancillary letters of administration; but when it paid the fund without resorting to those safeguards, it failed in its obligation and continued its liability. Ficken v. Emigrants' Industrial Sav. Bank, 33 Misc. Rep. 92.

The appellant contends, however, as is the law, that the jurisdiction of a surrogate over the estate of a nonresident decedent depends upon whether there is property belonging to such estate within his county, and if there is, and not in any other county of the State, his jurisdiction is exclusive, but if there is property in more than one county, the jurisdiction is concurrent (citing Code Civ. Pro., §§ 2476, 2477), and claims that if the mere appointment of an administrator within the State, without notice, was sufficient to put the bank upon inquiry, it would be necessary to examine the records of every surrogate in the State, in order to protect a debtor. This, as he insists, would be a harsh and unjust requirement, with which I agree. No court, under the circumstances, would, in my opinion, compel it. As stated, the bank was only held to ordinary care, which required, in this instance, an inquiry as to whether the surrogate of New York county had acted, he having original jurisdiction of the funds of decedent in question. That caution, if exercised, would have revealed the appointment of plaintiff, as stated.

Recognizing the authority of Stone v. Scripture, 4 Lans. 186, wherein it is held that a foreign administrator cannot discharge a mortgage upon a nonresident's property within this State, as against a domestic administrator, which I consider controlling herein, and in view of the foregoing, I think the judgment appealed from should be affirmed, with costs.

FITZSIMONS, Ch. J., and SCHUCHMAN, J., concur.

Judgment affirmed, with costs.

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GEORGE MARKGRAF, Respondent, v. CHARLES H. KLINGE, Appellant.

(City Court of New York, General Term, May, 1901.)

Witness — Credibility.

Disparaging questions put to a defendant must either be relevant to the issue or tend to affect his credibility as a witness, and the extent of such an examination is within the discretion of the trial judge.

APPEAL by the defendant from a judgment recovered by the plaintiff upon the verdict of a jury, and from an order denying the defendant's motion for a new trial.

Olney & Comstock (Leslie Richard Palmer, of counsel), for appellant.

James P. Niemann, for respondent.

DELEHANTY, J. This action was brought to recover the sum of $850, the balance due on four promissory notes made by the defendant to the plaintiff. The original liability of the defendant for the amount sued for was admitted, but it was claimed, on his part, that he had paid $750 on account of the $850, leaving a balance of only $100 due. The defendant, while a witness on the stand, was asked on cross-examination the following question: "Q. Have you had any trouble lately about the transfer of some property that was made to you, and that it was claimed you held fraudulently?"

This question was objected to, but the objection was overruled and an exception duly taken, and the witness answered, "Yes, sir." This is now assigned as error, and a reason why the judgment in favor of plaintiff should be reversed. Upon his redirect-examination, the defendant was given the fullest opportunity by the trial justice to explain the transaction involved in the question objected to, and did so by stating that the suit in which he was charged with fraud was withdrawn, and that the plaintiff therein declared he had no cause of action. Can it be said, then,

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that he was discredited or in any way harmed by the question objected to? While the purpose of this question was concededly to affect the defendant's credibility, his subsequent explanation of the transaction in question rendered it innocuous, and cured the error, if any was committed. Donahue v. Wippert, 7 Misc. Rep. 506.

I am of the opinion, however, that the question itself was unobjectionable. It has been held by a long line of decisions that disparaging questions put to a defendant must either be relevant to the issue on trial, or such as tend to affect his credibility as a witness (People v. Noelke, 94 N. Y. 143, and cases there cited), and that the range and extent of such an examination is within the discretion of the trial judge. This rule applies in civil as in criminal cases. Van Bokkelen v. Berdell, 130 N. Y. 145. It is not claimed here that there has been an abuse of judicial discretion.

For the reasons stated, I am of the opinion that the judgment and order appeal from should be affirmed, with costs.

Fitzsimons, Ch. J., and Schuchman, J., concur.

Judgment and order affirmed, with costs.

Max Solowye, Appellant, *v.* Isaac W. Hazlett, Respondent.

(City Court of New York, General Term, May, 1901.)

Practice — Motion for new trial on newly-discovered evidence — Code C. P., § 997.

A motion for a new trial on the ground of newly-discovered evidence will not be denied because the evidence is cumulative, provided it has such probative force as might change the result.

Such a motion should be heard on a case settled and signed by the trial judge, but the objection that this practice has not been followed is not available on appeal where it was not taken on the motion.

Such a motion should only be granted on terms.

Appeal by the plaintiff from an order granting the defendant's motion for a new trial upon the ground of newly-discovered evi-

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dence, without any terms whatsoever, and with ten dollars costs to the defendant against the plaintiff.

Abraham H. Sarasohn (Max D. Steuer, of counsel), for appellant.

Albert I. Sire, for respondent.

SCHUCHMAN, J. The complaint alleges a cause of action for goods sold and delivered to the defendant at the value of $154.20. The answer is a general denial. At the trial the defendant admitted that the goods were delivered to him, and that he received them; but he claimed that he was only the superintendent of the buildings upon which the goods were used, and that he purchased the same as the agent of the owner of the buildings, one William S. Long. The plaintiff, however, testified that he sold and delivered those goods to the defendant; that the defendant promised to him, when the bill was presented, to pay him in a few days of the next week. The question at difference was properly submitted to the jury, who rendered a verdict in favor of the plaintiff. The motion for a new trial on newly-discovered evidence was made on affidavits of the defendant Hazlett, one Max Wohl, Isadore Engel, Samuel Lewis and Max Marcus.

The appellant raises the point that the motion for a new trial on newly-discovered evidence, specified in said affidavit, should not have been granted, because the evidence is cumulative merely, and that it should appear to the court that the newly-discovered evidence, had it been given upon the trial, would have changed the result. In this I do not agree with him, because in Keister v. Rankin, 34 App. Div. 288, the rule is laid down that a new trial for newly-discovered evidence will not be denied because the evidence is cumulative, if it is of such probative force that it might probably change the result. I think that the evidence disclosed by the affidavits mentioned is of such force.

The appellant raises the point that, under section 997 of the Code of Civil Procedure, a motion for a new trial upon newly-discovered evidence can only be heard on a case settled and signed by the judge who tried it, as prescribed in the General Rules of Practice. This is correct (Katz v. Atfield, 41 N. Y. St. Repr. 459), but, by the omission to raise the question on the hearing of

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the motion, the objection is waived and is not available upon review. Bantleon v. Meier, 81 Hun, 162. The order appealed from, and the record on the appeal herein, does not show that the objection was raised at the hearing of the motion, and it must, therefore, be considered waived.

The appellant maintains that the order herein granting a new trial on the newly-discovered evidence should only have been granted upon terms, and that he should not have been punished by granting the motion, with ten dollars costs to the defendant against himself. In this, I think, he is correct. The order appealed from is, therefore, modified by striking out the allowance of ten dollars costs to the defendant, and inserting, instead, motion granted upon payment by the defendant of the taxable costs in the action, except extra allowance.

For the reason that the order is modified, I think no costs should be allowed to either party on this appeal.

FITZSIMONS, Ch. J., and DELEHANTY, J., concur.

Order modified, without costs.

BERTHA FRIEDHEIM, Respondent, *v.* THE METROPOLITAN STREET RAILWAY CO., Appellant.

(City Court of New York, General Term, May, 1901.)

Costs — Taxation where there was a disagreement and a second trial.

Where the jury disagree on the first trial of a case and the plaintiff succeeds on the second, she is entitled to tax two items for costs after notice of trial.

APPEAL from an order retaxing costs.

Henry A. Robinson (John T. Little and Henry M. Lummis, of counsel), for appellant.

Moses Feltenstein, for respondent.

SCHUCHMAN, J. This action was brought to recover damages for personal injuries, and at the first trial the jury disagreed.

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The case was subsequently retried, and resulted in a verdict in favor of the plaintiff. The bill of costs was taxed by the clerk, and included two items, amounting to thirty dollars — fifteen dollars each — "For costs after notice of trial." The clerk allowed only one item of fifteen dollars. To this the plaintiff excepted, and moved at Special Term for a retaxation, where an order was made allowing the two items of fifteen dollars, each to be taxed, and that order is appealed from.

The appellant relies upon the case of Seifter v. Brooklyn Heights R. R. Co., 53 App. Div. 443, in which the Appellate Division of the Second Department held that, under such circumstances, only one item should be taxed, while the respondent relies upon the case of Gilroy v. Badger, 28 Misc. Rep. 143, where the Appellate Term of the Supreme Court, in the First Department, held that the two items should be allowed.

Under these conflicting decisions, it seems to me that the only proper thing to do would be to affirm the order appealed from and let the Appellate Term determine the conflict.

Order appealed from affirmed, with ten dollars costs and disbursements.

FITZSIMONS, Ch. J., and DELEHANTY, J., concur.

Order affirmed, with ten dollars costs.

BENJAMIN GOLDSTEIN, an Infant, by MAX GOLDSTEIN, His Guardian *ad Litem*, Appellant, *v.* THE DRY DOCK, EAST BROADWAY & BATTERY RAILROAD CO., Respondent.

(City Court of New York, General Term, May, 1901.)

Negligence — A child of four years run over by a horse car while being led by a child of eight years.

In an action, by an infant aged four years, to recover for injuries received by being run over in the daytime by a horse-car of the defendant, it appeared that he was being led by his sister aged eight years, that it was twelve and one-half feet from their sidewalk to the rail where the accident happened, that when the children started to cross the street the car was distant from twenty-five to one hundred feet, that its horses were going very fast down an incline, that

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the driver was looking back into the car and had not his hand on the brake, that the plaintiff became confused, broke away from his sister, got on the track and was run over.

Held, that it was erroneous to dismiss the complaint.

That the driver was clearly negligent, and that the questions whether the girl of eight years was *sui juris*, and, if so, whether she was negligent, should have been submitted to the jury.

APPEAL from a judgment in favor of the defendant, dismissing the complaint after a trial before the court and a jury.

Abraham Levy (Charles Haldane, of counsel), for appellant.

Henry A. Robinson (John T. Little, of counsel), for respondent.

Per Curiam. This action was to recover damages for injuries received by the plaintiff through the alleged negligence of the defendant in the operation of one of its horse cars. At the close of plaintiff's case, his complaint was dismissed, and from the judgment entered thereon this appeal is taken.

We have before us the same questions presented to the trial justice, namely, whether there was sufficient evidence to go to the jury upon the defendant's negligence and the plaintiff's freedom from contributory negligence, and in the determination thereof the plaintiff is entitled to the most favorable inferences to be drawn from the testimony. The record shows that on May 12, 1897, between three and four P. M., the plaintiff, a child four years old, with his sister, nine years old, started to cross the street in the middle of the block, and at that time the car in question was, according to some of the witnesses, about three or four houses away, and, according to another witness, about a house away. The horses were going very fast, and the driver was looking into the car and not in the direction it was going, namely, towards the children; the plaintiff became confused, broke away from his sister, got upon the track, was knocked down by the nigh horse attached to the car and run over. The car was going down hill a little bit, and the driver did not have his hand on the brake. As the front wheel passed over the plaintiff the car was brought to a stop. From where these children started to cross the street to the car rail in question was twelve and a half feet. On the motion to dismiss, the defendant's counsel stated

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that the plaintiff at the time of the accident was *non sui juris*, and that it was a question whether then the little girl was.

A consideration of this evidence leads us to the conclusion that a question of fact was presented which should have been submitted to the jury. The conduct of the driver of the car in driving rapidly along a thoroughfare of a busy city without looking ahead, but with his eyes turned to the inside of the car, was grossly negligent. Mangam v. Brooklyn R. R. Co., 38 N. Y. 455. When we remember that the car at this time was proceeding on an incline, and that the driver, in addition to the foregoing, did not have hold of the brake, the negligence was accentuated, if that were possible.

Whether the little girl was *sui juris* was for the jury to determine; her years were not so tender that the court could decide that as a matter of law. As was said in Stone v. Dry Dock, East Broadway & Battery R. R. Co., 115 N. Y. 104: "In administering civil remedies the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. * * * From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material unless the child is of so very tender years that the court can safely decide the fact." Assume that the girl was *sui juris*. Should it not have been left to the jury to determine whether she acted with that degree of care which might reasonably be expected under the circumstances of one of her age? The jury would have been justified in finding that when the plaintiff and his sister started to cross the street the car in question was anywhere from twenty-five to one hundred feet away, assuming the width of lots in that vicinity to be twenty-five feet, and that the space between the sidewalk and track was twelve and a half feet. Under the circumstances the girl might well have supposed that she and her brother could cross the track before the car reached that point. There was negligence established on the part of the driver, and whether or not the girl exercised, under the circumstances, such a degree of care as might be reasonably expected of

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one of her age, should, in our opinion, have been submitted to the jury.

For the reasons stated, the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

Present: FITZSIMONS, Ch. J., DELEHANTY and SCHUCHMAN, JJ.

Judgment reversed and new trial granted, with costs to appellant to abide event.

CHARLES SMITH, Respondent, *v.* THE NEW YORK COOPERAGE CO., LIMITED, Appellant.

(City Court of New York, General Term, May, 1901.)

Pleading — Action by assignee for wrongful discharge — Real party in interest — Non-residence of assignor — Action for wages distinguished — Reply to counterclaim for assignor's failure to account.

Where the plaintiff sues as assignee for value of a claim for damages for wrongful discharge by a foreign corporation and the assignment is denied by the corporation's answer, further allegations thereof that the plaintiff is not the real party in interest are not good as a separate defense as the plaintiff is legally entitled to the claim and its ownership can be fully investigated under the denial of an assignment.

An allegation that the plaintiff's assignor is not a resident of the State of New York does not constitute a defense, since the plaintiff, as a resident, is entitled to sue in our courts although his assignor might not be competent to sue.

An allegation that another party is suing the foreign corporation as assignee of the same assignor in order to recover for the services rendered under the same contract of employment is not good as a separate defense, as an action for a wrongful discharge and one for wages earned before dismissal are independent causes of action.

Where the defendant's counterclaim, that the plaintiff's assignor has failed to account for a part of certain moneys entrusted to him by the defendant for its benefit, is denied by the reply, the plaintiff may go farther and allege and prove affirmatively and as a separate defense to the counterclaim that his assignor has fully accounted for all the moneys thus entrusted to him.

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APPEAL from an interlocutory judgment entered herein on March 26, 1901, sustaining the plaintiff's demurrer to the defenses contained in paragraphs V and VI of the defendant's answer, and overruling the defendant's demurrer to the defense contained in the second paragraph of the plaintiff's reply to the counterclaim contained in the ninth paragraph of said answer.

Theall & Beam (John Theall and John F. Forrester, of counsel), for appellant.

Lyman A. Spalding, for respondent.

Per Curiam. The construction of the pleadings by the justice at Special Term, upon the argument of the demurrers herein, was clearly right, and the interlocutory judgment should, therefore, be affirmed, with costs, on his opinion.

Present: FITZSIMONS, Ch. J., DELEHANTY and SCHUCHMAN, JJ.

Judgment affirmed, with costs.

The following is the opinion at Special Term:

O'DWYER, J. Demurrer by the plaintiff to the first and second separate defenses set forth in defendant's answer, upon the ground that they are insufficient in law upon the face thereof, and demurrer by the defendant to the separate defense set forth in the amended reply of the plaintiff to the counterclaim alleged in the defendant's answer, upon the ground that the same is insufficient in law upon the face thereof.

The action is brought by the plaintiff, a resident of the State of New York, as assignee of one Orrin R. Whitney, to recover damages for the breach of a contract for employment for the period of one year by the defendant, a foreign corporation, organized under the laws of the State of New Jersey. The first defense contained in the answer alleges that the plaintiff is not the real party in interest, and that his assignor is a nonresident of the State of New York, and the second defense alleges that the plaintiff is not the real party in interest and that there is another action pending against this defendant, brought by one Roach, as assignee of said Orrin R. Whitney. The complaint alleges in the eighth paragraph "that prior to the commencement of this action the said Orrin R. Whitney for value duly sold

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and assigned to the plaintiff as aforesaid the claim or demand against the defendant for damages for breach by it of the aforesaid contract of employment", and by proper denial this allegation is put in issue. The allegations that the plaintiff is not the real party in interest do not amount to separate defenses, inasmuch as the legal title to the claim is in the plaintiff, and under the denial of the assignment thereof the ownership of the claim can be fully investigated. Brown v. Powers, 53 App. Div. 251. With respect to the allegation in the first defense, that the plaintiff's assignor is a nonresident of the State, that allegation does not amount to a defense.

If the plaintiff has the legal title to the claim in suit, the fact that the claim was assigned to him for the sole purpose of conferring jurisdiction upon this court as a more convenient way to get the relief desired than would be possible in the courts of the defendant's residence is no bar to the plaintiff's action. Assuming that the plaintiff's assignor could not maintain this action in the courts of this State, the plaintiff, a resident, may, nevertheless, do so. Lindheim v. Sitt, 33 Misc. Rep. 62; Jefferson County Bank v. Townley, 159 N. Y. 490. The statement in the second defense that there is another action pending by one Roach, as assignee, to recover for the services actually rendered under the contract of employment, does not amount to a defense. The claim for wages earned and due before the dismissal, and for damages for a wrongful dismissal, constitute two separate and independent causes of action, and may be prosecuted separately. Perry v. Dickerson, 85 N. Y. 345. The counterclaim set forth in the ninth paragraph of the answer alleges that on divers days between the 1st day of June and the 1st day of September, 1899, the defendant delivered, paid over and intrusted to the said Orrin R. Whitney, as its manager aforesaid, to be expended by him for the benefit and for the account of this defendant, and in and about its business, certain sums of money, amounting in the aggregate to the sum of $1,617.61, and that the said Orrin R. Whitney received the same for the purpose aforesaid, and that he has accounted to this defendant for the sum of $984.08 only, which he expended for and on behalf of this defendant, and that at the time of the alleged assignment set out in the complaint, and at the time of the commencement of this action, there was due and owing to this defendant from said Orrin R. Whitney

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the sum of $633.43, which he has failed to account for to this defendant. This allegation is denied by the plaintiff in his reply, and then, for a further and separate defense to the counterclaim, alleges "that Orrin R. Whitney, the plaintiff's assignor, has fully and fairly accounted for and paid over to the defendant or to other persons, corporations and firms to its use, any and all moneys which may have been delivered, paid over or intrusted to the said Orrin R. Whitney by the defendant as in said counterclaim alleged." In order to establish its counterclaim, all that the defendant is bound to show is that the moneys claimed to have been paid to the plaintiff's assignor were, in fact, paid to him by the defendant for its use, and upon doing so it may rest. Under the denial the plaintiff would be permitted to disprove the receipt by its assignor of the moneys, and possibly that he had accounted to the defendant therefor, but he would not be permitted to show that he had paid the money so received by him either to the defendant or to others, for the defendant's use, that being a matter of affirmative defense. Andrews v. Moller, 37 Hun, 481; Salisbury v. Stinson, 10 id. 242; Hicks-Alixanian v. Walton, 14 App. Div. 199. The plaintiff's demurrer to the first and second separate defenses contained in the answer of defendant must be sustained, with $20 costs, with leave to defendant to amend within six days upon the payment of costs, and the defendant's demurrer to the separate defense contained in the reply of the plaintiff must be overruled, with $20 costs.

ISAAC COHEN, Plaintiff, *v.* MAX COHEN, Respondent.

(City Court of New York, General Term, May, 1901.)

Interpleader.

A defendant cannot procure an order of interpleader, upon allegations that another person claims the same money as the plaintiff and for the same services, where the defendant does not admit liability to either party, nor shows that the claimant has any foundation for his claim, or makes it appear that it would be hazardous for the defendant to determine which party he should pay, and particularly where the claimant denies that he claims the fund and alleges that he has commenced an independent action against the defendant for services of the same nature.

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APPEAL from an order in favor of the defendant, interpleading and substituting one Simon Sindeband in the place and stead of the said defendant in the above-entitled action.

Joseph Wilkenfeld, for appellant.

Davis & Kaufmann (Edward Kaufmann, of counsel), for respondent.

Hyman Cohen, for plaintiff.

Per Curiam. The plaintiff seeks to recover in this action the sum of $255 for commissions which he earned on the sale of certain real estate belonging to the defendant. The defendant, before answer was due, moved on affidavit and notice that one Simon Sindeband be substituted in his place herein, and that affidavit, as far as material, is as follows: "That this action is brought to recover the sum of two hundred and fifty-five dollars * * * for alleged services rendered as a real estate broker on the sale of real estate known as Nos. 240 and 242 Clinton Street in the City of New York. Deponent has received notice from one Simon Sindeband, that he claims to be entitled to the commission on the sale of said property for alleged services rendered by him to deponent, who was the owner of said property, and that he claims to be entitled to said sum of money sued for by the plaintiff in this action. Deponent further says that the claims of the plaintiff herein, Isaac Cohen, and of the adverse claimant, Simon Sindeband, have been made without collusion of the defendant with them or either of them, and that deponent, the defendant in the above-entitled action, has no interest in the aforesaid sum claimed by the plaintiff herein, as well as by the adverse claimant, except to deliver the same to the person lawfully entitled thereto, and that deponent cannot safely determine as to which of said claimants the said sum of money should be delivered; that he is ready and willing to deliver the said sum to such person, or deposit the same in such place as the court may direct." The appellant, Sindeband, submitted an affidavit in opposition to the motion, setting forth that he does not claim the same fund as alleged in defendant's affidavit, and that prior to the motion he had commenced an action against the defendant

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herein to recover the amount of his claim, which was also for broker's commissions.

Construing these affidavits in the light of recent decisions, we are unable to see how the order of interpleader can stand. The most that can be claimed to be established is that Sindeband has made a demand for broker's commissions on the sale of the property in question; whether or not there is any foundation for such a claim the moving papers fail to show. This is fatal under the authority of Stevenson v. New York Life Ins. Co., 10 App. Div. 233; Roberts v. Vanhorne, 21 id. 369. Furthermore defendant does not admit a liability to either plaintiff or Sindeband for the commissions in question, and if for no other reason, his application should have been denied. Baltimore & Ohio R. R. Co. v. Arthur, 90 N. Y. 234. But the papers are faulty in other respects. In Wells v. National City Bank, 40 App. Div. 498, 501, it was held: "That to authorize an order, it is not sufficient that a claim has been presented against a fund already claimed by another, but that it is necessary for the moving party to prove that the claim has some reasonable foundation or that the stakeholder cannot, without hazard, determine to which of the claimants he should pay the fund. What is required upon the subject is proof of some kind and not naked assertions." See also Steiner v. East River Savs. Inst., 60 App. Div. 232. No facts are alleged herein which make it appear that it would be hazardous for the defendant to determine to which of the parties he should pay the money in question. For all that appears the plaintiff and Sindeband may have separate and distinct claims for services rendered under contract with defendant, and if such is the case interpleader cannot be granted. McCreery v. Inge, 49 App. Div. 133.

For the reasons stated the order should be reversed with ten dollars costs and disbursements, and the motion denied, with ten dollars costs, with leave, however, to renew the application on other papers.

Present: FITZSIMONS, Ch. J., DELEHANTY and SCHUCHMAN, JJ.

Order reversed, with ten dollars costs, and motion denied, with ten dollars costs, with leave to renew application on other papers.

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BENJAMIN C. BARRY et al., Appellants, *v.* ADOLPH WINKLE, Respondent.

(City Court of New York, General Term, May, 1901.)

Costs — In City Court of New York for failure to try a case, on the short cause calendar, within one hour.

Where a case on the short cause calendar of the City Court of the city of New York is not tried within one hour and, consequently, is ordered to the general calendar, the trial court may impose upon the party, who put the case on the short calendar, reasonable costs for failing to complete the trial within one hour.

APPEAL by the plaintiffs from an order of the Trial Term for short causes, ordering them to pay the defendant forty-five dollars costs. The attorneys had stipulated that the plaintiffs should move to put the case on the short cause calendar, the defendant to waive all costs resulting from the denial of the motion or from the restoration of the cause to the general calendar, if not tried within the time allowed by the court. Subsequently the defendant's attorney, for reasons assigned, withdrew the stipulation, upon his part, and refused to be bound by it, although the plaintiffs had noticed the motion.

Bullowa & Bullowa (Ferdinand E. M. Bullowa, of counsel), for appellants.

Thomas M. Rowlette (John A. Straley, of counsel), for respondent.

Per Curiam. There was no waiver of the costs in question by the defendant. The order appealed from imposing forty-five dollars costs was proper. The case was on the short cause calendar and upon its trial the parties hereto had the right to one hour; if, at the end of that time, the court deemed it proper, he might order the case upon the general calendar. The case did take over one hour to try, and in pursuance of the power vested in him the trial justice ordered it to the general calendar and directed the plaintiffs to pay the defendant forty-five dollars costs for their failure to try the case in the time limited. The power of

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the court to impose reasonable costs in such instances has never to our knowledge been questioned. Even the plaintiffs' attorney concedes the power of the trial justice to do so. See stipulation in the case. The plaintiffs in having this case placed on the short cause calendar, thus giving them an earlier trial than other litigants, having issues of even date, were the recipient of a favor. Their failure to do as required by the order granting them such favor, to-wit, to dispose of their case within one hour, created partly the disfavor of the court, which was properly expressed in this instance by the imposition of the costs in question, which were not unreasonable or a violation of sound discretion.

The order appealed from is affirmed, with costs.

Present: FITZSIMONS, Ch. J., DELEHANTY and SCHUCHMAN, JJ.

Order affirmed, with costs.

Matter of the Application of JOHN J. KELLY for a Writ of Mandamus *against* ROBERT A. VAN WYCK, as Mayor.

(Supreme Court, Kings Special Term for Motions, June, 1901.)

Office — Term cannot be prolonged by the legislature — Const. of 1894, art. X, § 2; L. 1897, ch. 378, §§ 1392, 1394 — Mandamus.

An extension of the terms of office of city magistrates of the city of New York by an act of the legislature is in effect an appointment by the legislature for an additional term, and such act therefore violates section 2 of article X of the Constitution which requires existing city officers to be elected by the electors of the city or some division thereof or to be appointed by such authorities thereof as the legislature shall designate.

The said constitutional provision covers the duties of the offices it refers to, and a change in the name of the office does not take it outside of the said provision.

An elector of the city of New York is entitled to a writ of mandamus compelling the mayor to appoint, notwithstanding such act.

APPLICATION for a peremptory writ of mandamus to require the mayor of the city of New York to appoint four city magistrates.

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Sanders Shanks for petitioner.

W. J. Carr opposed.

GAYNOR, J.: The terms of the four city magistrates mentioned in the petition concededly expired on the last day of April, 1901. Thereupon it became the duty of the mayor by a mandatory provision of the city charter (sec. 1394) to appoint their successors. The legislature this year by the amended city charter (sec. 1392) purported to extend the terms of the said magistrates until January 1, 1902. But this is violative of section 2 of article X of the state constitution, which requires in so many words that existing city officers shall be elected by the electors of the city, or some division thereof, or appointed by such authorities thereof as the legislature shall designate. It has so often been declared by our highest court that an act of the legislature prolonging an incumbent's term to an office which can be filled only by election or appointment as prescribed in the said constitutional provision is in effect an appointment by the legislature, and therefore void, that it is not a subject for discussion (People ex rel. Fowler v. Bull, 46 N. Y. 57; People ex rel. Williamson v. McKinney, 52 N. Y. 374; People ex rel. Lord v. Crooks, 53 N. Y. 648; People ex rel. Le Roy v. Foley, 148 N. Y. 677; People ex rel. Lovett v. Randall, 151 N. Y. 497; People ex rel. Eldred v. Palmer, 154 N. Y. 133). The duties and office of magistrate existed at the time of the adoption of the said constitutional provision; indeed, they have existed from time immemorial. That such duties have been transferred by statute from the former magistrates to magistrates with a new name since the last constitution was adopted, does not change the case. The said provision covers and protects the duties of the office in all their transfers by the legislature to newly created officials, and such officials have to be elected or appointed in the said manner prescribed therein, *i. e.*, by the electors of the city or some official or officials thereof (Warner v. People, 2 Denio, 272; People v. Pinckney, 32 N. Y. 377; People v. Raymond, 37 N. Y. 428; People ex rel. Bolton v. Albertson, 55 N. Y. 50). In this case the appointment is by the legislature. In respect of the duty of the mayor to appoint, this act of the legislature is as though it did not exist; and his neglect to appoint would aid the legislature to override the constitution and keep officials illegally in office.

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The right of the petitioner as an elector of the city to a writ of mandamus to require the official duty of appointment to be performed is also beyond dispute (People ex rel. Boltzer v. Daley, 37 Hun, 461; People ex rel. Stephens v. Halsey, 37 N. Y. 344; People ex rel. Kelly v. Common Council, 77 N. Y. 503; People ex rel. Eldred v. Palmer, 154 N. Y. 133; People ex rel. Miller v. Cummings, 72 N. Y. 433). The electors have the right to have these offices filled as required by law.

Let a peremptory writ issue that the appointments be made within two days.

Matter of the Application of JACOB BRENNER, as Commissioner of Jurors in the County of Kings to Compel the Delivery to Him of the Books and Papers Belonging or Appertaining to such Office of Commissioner of Jurors in the County of Kings, and now in the Possession of WILLIAM E. MELODY.

(Supreme Court, Kings Special Term, June, 1901.)

Office — Commissioner of jurors of Kings is a local officer and an aid to the court — Constitutionality of L. 1901, ch, 602 — Compulsory delivery of books and papers under Code C. P. § 2471a.

The commissioner of jurors of the county of Kings is not a county but is a local officer, aiding in the administration of justice within a prescribed territorial limitation by obtaining, under the supervision and direction of the court, qualified jurors for it.

Where his office is not elective, he need not be appointed by the board of supervisors or other county authorities of Kings, as required in the case of county officers by article X, section 2 of the Constitution of 1894, and hence chapter 602 of the Laws of 1901 authorizing State officers, a majority of the justices of the Appellate Division of the Second Department, to appoint him, is constitutional.

Where the incumbent of said office under a term unexpired, refused, upon the ground of the unconstitutionality of said act, to surrender the books and papers of the office to the appointee of a majority of the justices of said Appellate Division as required by said act, and the appointee proceeded under Code Civ. Pro., § 2471a, to compel a delivery of the same, and the allegations of his motion papers were not denied by the incumbent nor any papers submitted

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by the latter other than a brief, the Special Term considered that all the allegations of the moving papers must be taken to be true and that the questions of the constitutionality of the statute and of the title to the office thereunder were directly involved.

That, as the title of the applicant to the office was, under the statute clear and free from doubt, the relief asked by him should be granted notwithstanding the general rule that the title to an office is not to be tried upon such a motion.

APPLICATION, under section 2471a of the Code of Civil Procedure, for an order compelling delivery of books and papers belonging to a public office. The facts appear in the opinion.

H. W. Goodrich, for applicant.

R. H. Elder, for respondent.

MADDOX, J. The applicant was, pursuant to the provisions of chapter 602 of the Laws of 1901, on May thirteenth, appointed commissioner of jurors in the county of Kings by a majority of the justices of the Appellate Division, in the second judicial department, in which department said county is situated, and, having duly qualified, he thereupon demanded of the respondent, who theretofore lawfully held the office of commissioner of jurors for said county and was then exercising the functions and performing the duties thereof, the possession of said "office * * * and all the books and papers appertaining thereto."

The term for which respondent was appointed has not yet expired, but the provision of the act in question is that "Upon the appointment and qualification of a commissioner of jurors in any county appointed under the provisions of this act the term of a commissioner of jurors in such county in office at the time of such appointment shall terminate and he shall turn over to the commissioner of jurors appointed under this act all books, papers, records and property in his possession or under his control as such commissioner of jurors," and respondent, having refused to comply with such demand, justifies his action upon the ground that the act is unconstitutional, in that it contravenes the provisions of section 2 of article X of the Constitution, inhibiting the appointment of county officers by other than "the board of super-

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visors or some other county authority," contending that the office in question is a county office, and that the appointing board is not a county authority.

Petitioner now seeks an order, under section 2471a of the Code of Civil Procedure, directing the delivery to him as such commissioner of jurors of the books and papers belonging to the office. The respondent appeared on the motion, but, other than his brief, submitted no papers; no proofs in contradiction of the matters alleged in petitioner's motion papers, and, hence, all the averments of fact therein contained must be taken as conceded, as true.

This is a summary proceeding, long known under our statutes (R. S. 124, 125, §§ 50–53), to compel any person, including an incumbent of an office whose term is at an end, in whose possession the books and papers belonging to a public office may be, to deliver the same to the officer entitled thereto, to the end that the due and proper performance of official duties shall not be delayed or interfered with, and that public interests shall not be hazarded.

The title to an office, as between contending claimants, should not be litigated or determined in such a proceeding as this, unless, as held by the Appellate Division, Mr. Justice Willard Bartlett writing, in Matter of Sells, 15 App. Div. 575, "the undisputed facts presented upon the application show beyond substantial doubt or controversy that the * * * appointment of the person claiming the books and papers was void."

The issue of title to a public office involves the right of the People of the State to be a party, and the right of the parties to a jury trial and that in an action in the nature of a *quo warranto;* consequently the relief sought for here can only be granted where the right of the applicant is clear and free from doubt. Matter of Baker, 11 How. Pr. 429; Matter of Carpenter, 7 Barb. 37; Morris v. Whelan, 64 How. Pr. 109; Matter of Bradley, 141 N. Y. 530.

Within his right and, indeed, within the line of his duty, the respondent, in his so refusing to comply with said demand, squarely presents the question as to the validity of the act under consideration; he was at the time of the enactment a public officer and had taken, it is to be presumed, since that was required (Laws of 1858, chap. 322, § 5), the "usual oath of office;"

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had thereby obligated himself to support the Constitution and faithfully to perform the duties of his office, and if the statute in question offends the organic law, then it is his duty to refuse to deliver the "books and papers appertaining" to said office, for anything less would have been a failure on his part in the performance of his official duties and a violation of his oath to support the Constitution; his oath of office does not permit an acquiescence in that which is forbidden by law, and if the office of commissioner of jurors, as it existed prior to the act of 1901, is a county office, then that statute offends the constitutional provision before quoted (art. X, § 2), is void and "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed." Newton v. Shelby, 118 U. S. 442.

Thus we have here presented for consideration the situation contemplated in Matter of Sells, *supra*, and, notwithstanding that the impropriety of the court at Special Term in passing upon the constitutionality of legislative enactments upon the hearing of motions has been well recognized and is fully appreciated by the writer, the determination of the question of validity is essential to the decision of this application.

First, we have the presumption of constitutionality attaching to every legislative enactment, and the burden of showing constitutional contravention is upon those asserting the invalidity (People ex rel. Henderson v. Supervisors, 147 N. Y. 15), which must be conclusively established, that is beyond rational doubt; for the conflict with the Constitution, as Judge Peckham says, "must be manifest and unequivocal;" there must remain no room for reconciliation. N. Y. & O. M. R. Co. v. Van Horn, 57 N. Y. 477; People ex rel. Henderson v. Supervisors, *supra;* People ex rel. Carter v. Rice, 135 N. Y. 484; Pearce v. Stephens, 18 App. Div. 106.

Then again we have the presumption that judicial officers act within the limitations of the Constitution and that they do no act in violation thereof, that they do no illegal act. The appointing authority here were and are justices of this court, assigned to the Appellate Division thereof, and as such have also taken the usual oath of office. We cannot assume that they have not, before making the appointment of such commissioner, considered the question of the validity of the act under consideration, and

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have determined the same, since they are required only to act under and in obedience to valid laws, not to void laws. Newton v. Shelby, *supra.*

But that determination is not final and binding here, for the reason that the respondent has not been heard, and this application may be made the basis for further proceedings against him in event of his failing to obey the order to be entered hereon, and consequently the question of constitutionality must be considered.

Was the office of commissioner of jurors for Kings county a county office? If it was, then this application must be denied, since no new office has been created and the appointing power is not a county authority. Additional duties have been added to the office, but the office as it originally existed must be held as having been continued.

In answering the question we must determine the duties and functions of the office and then their character and relation to the county as a political division of the State. Prior to the act of 1858 (chap. 322), jurors in Kings county were, as in all other counties excepting New York, drawn by the county clerk and summoned to attend by the sheriff of the county, and reference to the earlier provisions of law as to the summoning of jurors by the sheriff upon receipt of the writ of *venire facias juratores* is unnecessary here.

The duties as devolved, briefly stated, relates only to the entering in a book and the preparation of a list of the names of persons qualified for jury service, as returned by the assessors, and the preparation of ballots, giving the name, vocation and residence of each person, and the placing of such ballots in a box or wheel for subsequent drawing (Laws of 1858, chap. 322, §§ 7, 8, 12, 13, 14; Code Civ. Pro., §§ 1135–1140); attending with two judicial officers, who had been previously notified, upon the drawings of the names of qualified persons from said box to serve as jurors (Laws of 1858, chap. 322, §§ 15–18; Code Civ. Pro., §§ 1140–1145); the summoning for attendance those so drawn (Laws of 1858, chap. 322, § 21; Code Civ. Pro., § 1146), and with two judicial officers to hear applications for remission of fines imposed upon delinquent jurors for nonattendance. Laws of 1866, chap. 821, § 3; Code Civ. Pro., § 1154.

And here it may be said, that upon the completion of each drawing of jurors in Kings county "The judges must * * *

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close each box; and place upon the cover thereof, their seals." Code Civ. Pro., § 1143.

There is no relation of any of the duties cast upon the commissioner, so far as I have been able to find after a most thorough research, and I have not been referred to any by counsel, to the affairs or government of the county. He exercises no function or duty whatsoever having any reference to or connection with the governmental affairs of the county, but he is an aid to the court, and, indeed, he performs functions most closely related to and essentially connected with the court and the administration of justice, though not in any sense of a judicial character.

The right to a jury trial as guaranteed by the Constitution and the Bill of Rights necessarily leads one to the conclusion that a jury is an essential part of a court of law and that a court of law without a jury is not constitutionally organized.

The term "court" in its general and enlarged sense comprehends within its purport both the justice and the jury, both being component parts of a court of law. Goddard v. State, 2 Yerg. (Tenn.) 104.

As said by Mr. Justice Gray, in Capital Traction Co. v. Hof, 174 U. S. 13: "III. 'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and to issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books."

If as stated above, the jury is essentially a component part of a court of law, then is not the officer who prepares the jury lists, who participates with the justices in the drawing of jurors and summons in attendance those so drawn an aid to the court rather than a county officer?

The legislature has declared that the commissioner of jurors

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appointed, pursuant to chapter 369 of the Laws of 1895, in counties having a population of three hundred thousand or more, according to the then last preceding census, "shall be an officer of the courts of record in such county," but the counties of New York and Kings are excepted from the provisions of that act. The duties of the commissioner under that act are the same as those provided by law for the commissioner of jurors for Kings county and a reason why the one should be "an officer of the courts of record in" his county and the other not, but a county officer, may well be asked for and, in my opinion, sought for in vain.

Reference being had to the various enactments for the appointment of such commissioners will prove instructive and they are entitled to some weight in determining the intention of the legislature as to the character of the office. In New York county the mayor of the city was for a long time one of the appointing power, then for a time had sole authority to appoint, and by the Greater New York charter it is provided (§ 118) that the mayor shall have the power to appoint a commissioner of jurors for the boroughs of Manhattan and The Bronx. In this county at one time the judge of the City Court of Brooklyn was one of the appointing board and it must be remembered that the commissioner, with the attending judicial officers, drew and summoned jurors for that court, though it was, as the name implies, of limited jurisdiction, being a superior city court. Likewise, the judges of that court were entitled to notice of drawings, to participate therein and also in the hearings upon remission of fines. In all the other acts for the appointment of such commissioners it will be seen that various appointing boards were created, and in some the justices of the Supreme Court residing in the county for which appointment was to be made, if there be any, were included. It will thus be seen that the office has not been considered either a county or a city office, for in some instances a city officer has made or participated in making the appointment, and in others State officers, justices of the Supreme Court have been included in the appointing authority.

By the act creating the office of special commissioner of jurors in counties having a population of more than 500,000 (Laws of 1896, chap. 378), the power of appointment and removal was vested in the "justices of the Appellate Division of the Supreme

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Court in the department within which each county embraced" thereby is situated. Here is language identical with that in the act under consideration, and there the duties cast on the commissioner related to drawing and summoning special jurors within the county.

There were but two counties for which such commissioners were appointed — New York and Kings. That act was assailed as being unconstitutional on several grounds and was sustained as a valid exercise of legislative power (People v. Dunn, 157 N. Y. 528), though the question raised here was not presented by counsel in that case.

By chapter 623, Laws of 1899, an act with which many of us are very familiar, the control of the court over the special commissioner and also the regular commissioner of jurors in this county was recognized, and, indeed, emphasized in most explicit language, for it provided among other things that "The justices of the supreme court residing in any county having a special commissioner of jurors, * * * or a majority of them, may require such special commissioner of jurors to scrutinize and revise the general panel or list of trial jurors for such county, under their supervision and direction. * * * That no person shall be rejected as a juror until a list, * * * stating the cause of rejection of each, has been submitted to and approved by said justices; that any person failing to attend before said special commissioner, after having been summoned so to do, or refusing to be sworn or answer any pertinent question may be punished therefor by any trial justice of the supreme court sitting in such county, and that the "regular commissioner of jurors, or other official with that duty, shall continue to make up the general list or panel of jurors each year as heretofore, but under the supervision and direction of said justices."

Can a closer relation to the court in the detail of preparing the jury lists or panels and the drawing and summoning of jurors be well conceived than the performance of the duties devolved by the statutory provisions before quoted upon the commissioner?

The act providing for such special commissioner of jurors (Laws of 1896, chap. 378) has been repealed (Laws of 1901, chap. 601), and the duties of that office have been cast upon the commissioner of jurors by the provisions of the act under consideration here. Chap. 602. Likewise the provisions of chapter

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623 of the Laws of 1899 have been incorporated in section 1132 of the Code of Civil Procedure, as amended by chapter 600 of the Laws of 1901, and are now made expressly applicable to the commissioner of jurors in Kings county.

Indeed, assuming an extremely improbable, though not impossible case, if all the laws providing for the listing, drawing and summoning of jurors were, for any reason, to become inoperative, it would then, in my opinion, be the duty of a court of law and the justice presiding thereat to cause the attendance of jurors or talesmen in the manner provided for and obtaining under the common law and by the common-law writ of *venire facias juratores*.

Except in Westchester county, the court now has, if an insufficient number of jurors attend, the right and power to command the sheriff to summon from the by-standers or from the county at large a sufficient number of qualified talesmen.

Further comment is unnecessary, for it seems to me indisputable that the commissioner of jurors is not a county officer, but is a local officer aiding in the administration of justice within a prescribed territorial limitation; he is an aid to the court in obtaining, under its supervision and direction, qualified jurors for attendance in the courts of law. State v. Kendle, 52 Ohio St. 356; State v. Mounts, 36 W. Va. 179.

Motion granted.

FANNY ARMING, Plaintiff, *v.* CHARLES H. STEINWAY et al., Exrs., Etc., of WILLIAM STEINWAY, Deceased, Defendants.

(Supreme Court, Kings Trial Term, June, 1901.)

Services — Contract when abated by death of employer.

William Steinway, who died three months later, stated to the plaintiff, a teacher, that she "should give him all the time she had to spare to give German lessons to pupils, which he would send to her in a room in Steinway Hall, which he would let her have for that purpose, and that she would surely earn $15 a week for the time from the 21st of September, (1896) till the 30th of June, 1897". She promised to give him "all the time" and he promised to pay

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her one dollar a lesson for pupils sent her by him who did not pay her for their lessons. In an action by her against his executors,

Held, that she could recover one dollar for each pupil sent by him and who did not pay.

That the contract involved a personal relation, as well as a personal selection of beneficiaries, and that it terminated with the death of William Steinway.

Motion for a new trial.

Cochran, Moore & Hildreth, for plaintiff.

Fernando Solinger, for defendants.

Russell, J. On the trial the plaintiff had a verdict of $600, and interest, for forty weeks of assumed service in teaching pupils the German language at the request of the late William Steinway. The sole proof of the contract was the testimony of plaintiff's mother who testified that at Steinway Hall, on the 21st of September, 1896, Mr. Steinway told the plaintiff that "She should give him all the time she had to spare to give German lessons to pupils, which he would send to her in a room in Steinway Hall, which he would let her have for that purpose, and that she would surely earn $15 a week for the time from the 21st of September, till the 30th of June, 1897, and she would give him all the time."

Contracts carrying pecuniary obligations may undoubtedly be inferred from language sufficiently expressive to support the presumed intent to pay by the one and to receive by the other. But the supporting basis must be wholly of service for pecuniary reward so far as it can be enforced, and the whole transaction so construed in defining the limit of legal obligation.

Here the plaintiff could not but understand that the offer of Mr. Steinway was the utterance of a charitable purpose to help young students to the extent of the deficiency in their power to pay themselves for the lessons furnished, to give the plaintiff herself a free and suitable place to teach any who might choose to apply, whether sent by Mr. Steinway or not, expecting to pay for the benefit, leaving her entirely the privilege of teaching every one she chose to serve for such emoluments as she required, with

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proper surroundings and conveniences furnished her gratuitously by her benefactor, William Steinway. The only pecuniary obligation Mr. Steinway assumed was to pay one dollar per lesson for those sent by him who did not pay for their lessons. He did not guarantee fifteen dollars a week for forty weeks. He simply asserted his conviction that she could earn that sum; and I find no proof in this case that she did not. For all that appears she may have received far more from pupils who did pay her.

There is some evidence that Mr. Steinway did send to her Miss Crawford and Miss Mengel to whom she gave seventeen lessons. The case is silent as to any others being authorized by him to incur pecuniary obligations for him, and on the 11th of December, 1896, the plaintiff by itemized account only claimed $39 instead of $150 then earned if her position now be correct.

Another serious obstacle lies in her path. The benevolent execution of the plan continuously ran with the volition of Mr. Steinway in finding needy learners, and ceased by closure when the heart which willed and chose each benevolence was stilled by death. The charity was personal not transmissible to the discretion of executor or next of kin. Death of the employer stops the further execution of many contracts of service even where the server can continue his work. Lacy v. Getman, 119 N. Y. 109; Weber v. Bridgman, 113 id. 600; Farmers' Loan & Trust Co. v. Wilson, 139 id. 284; Hunt v. Rousmanier, 8 Wheat. 174.

A fortiori, when the continuous execution lies only with the employer through his own intelligent selection, his death closes the work under the plain purpose and scope of the contract.

William Steinway died November 30, 1896, less than three months from the date of the asserted contract. No recovery for over ten weeks could be obtained under any permissible view of the contract, and no jury can upon such proof as here given take for a young lady from a dead man's estate the amount of the verdict rendered.

Let there be a new trial unless the plaintiff stipulates to reduce the recovery to seventeen dollars and interest from November 30, 1896.

Ordered accordingly.

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JULIUS P. BAUMANN et al., Plaintiffs, *v.* THE NEW YORK, NEW HAVEN & HARTFORD R. R. Co., Defendant.

(Supreme Court, Kings Trial Term, June, 1901.)

Common carrier — Failure to deliver — Measure of damages.

Where a common carrier fails to deliver summer goods within a reasonable time it is liable for the breach, and the consignees may recover the full value of the goods where they refuse to call for them when notified by the carrier to do so, the season for sale being over, and the carrier subsequently permits the goods to become worthless from an apparently negligent exposure to moisture.

ACTION against a common carrier for nondelivery of goods.

A. H. Geismar, for plaintiffs.

Strong & Caldwalader (John F. Charlton and George Coggill, of counsel), for defendant.

RUSSELL, J. For nondelivery of summer goods in seasonable time the defendant, as a common carrier between Boston and New York, is sued for the resulting damages. They were delivered at Boston July 10, 1899, to be transported to plaintiffs at New York. July twelfth plaintiffs' truckman called for the goods at defendant's New York wharf, but did not get them. July fourteenth plaintiffs' manager, Schey, called at the wharf for the property and was told it was not there and could not be found. Before August first he went three other times with a similar result. Calling again August second and asking for the general manager of the freight department, he interviewed some one whose authority does not appear, but who directed a search for the goods, which was ineffective, and told Schey to send in his claim "and we will pay the check." The claim was sent in August fifth, but never recognized as valid. August eighth defendant notified plaintiffs that the goods were found, and they should call for them. Plaintiffs replied, "We don't want the goods now. The season is over." August sixteenth defendant notified plaintiffs again to take the goods. In June, 1900, under

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an attempt of the parties to adjust their differences, Schey examined the goods at defendant's warehouse and found them wet and mouldy.

In deciding as to the right of recovery it is unnecessary to review the range of the law of negligence or the presumptions showing when conversion of personal property may be adopted to reach the ends of justice. Here it is only essential to follow the lines of contract obligation. A common carrier agrees to transport goods delivered to it within a reasonable time and does not perform. The contract broken, what are the damages?

Ordinarily the shipper may recover the difference in value at the time he receives the goods and when they should have been obtained, with such loss as the delay occasioned. Scovill v. Griffith, 12 N. Y. 509; Zinn v. New Jersey Steamboat Co., 49 id. 442.

That rule obtains here. There are no special circumstances to divert the liability from contract to tortious obligation. The only question to be solved is as to what period of time shall be adopted to evidence the depreciation in value. Shall it be in August, 1899, when plaintiffs could have obtained their goods, or in June, 1900, when they were found to be spoiled? There can be but one recovery for this breach and damages may be recovered to the day of trial. Wilcox v. Executors, 4 Pet. 172; Behrman v. Linde, 23 N. Y. St. Rep. 491.

The condition of the property at the later date indicates exposure to recent moisture. If, therefore, the plaintiffs were exempted from the duty of taking their goods, or the defendant had presumptively neglected its contract duty to use reasonable care to preserve them, liability arises for their full value. It is not a case of loss by fire without fault or of gradual deterioration by the wasting power of time, but of unexplained destruction by apparently negligent exposure. Hence, even if plaintiffs should have taken the goods by again sending a truck for them after they were found, the defendant is not exonerated from responsibility in allowing their utter loss.

It may also be doubted if the letter of August eighth, saying that plaintiffs did not want the goods, as it was too late, was a complete waiver of defendant's obligation to deliver the goods in August, 1899, when they were found. The plaintiffs had been to unusual trouble and expense to send to the wharf for them,

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and when the defendant found it could deliver it was time to restore the goods without further expense to plaintiffs. In fact some of the burden of the previous efforts of plaintiffs might be justly charged to defendant. A trial of the issue had before August 8, 1899, would have resulted in a recovery for the full value. On August second some one at defendant's office had recognized its liability to pay for the goods, and the promise to pay therefor, though not forceful as an obligation for want of proof of authority to make it, was made in defendant's name by some one in apparent power to search for and deliver the goods, and this might well excuse plaintiffs from again sending for the goods instead of the pay for them.

Let judgment go for the full value as proven.

Judgment accordingly.

FREDERICK GERKEN, Plaintiff, *v.* CHARLES W. HALL, Defendant.

(Supreme Court, New York Special Term, June, 1901.)

Injunction — Rights as between a landlord who desires to improve premises and a tenant of a part of them.

A tenant of a café and barroom in Manhattan will not be granted a continuance of a temporary injunction restraining his landlord, about to add several stories to the building, from erecting a wooden bridge or structure in front of the tenant's demise interfering to some extent with his easements of light, air and access, where the bridge is required by and complies with the building code of the city of New York and is essential to the building operations, as in such case the continuance of the injunction would be a greater hardship to the landlord than its vacation would be to the tenant.

MOTION to continue an injunction.

Lemuel Skidmore, for plaintiff.

McCrea, Somerville & Taylor, for defendant.

BLANCHARD, J. The plaintiff, the lessee of a store of defendant known as No. 138 Nassau street, in the city of New York, seeks to continue the temporary injunction restraining the defendant, the

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owner of the building, situated at the northeasterly corner of Nassau and Beekman streets, known as the "Morse Building," from erecting a wooden bridge or structure in front of the demised premises occupied by plaintiff as a first class café and bar-room. It appears that the defendant being desirous of making certain alterations to his said building and by adding several stories to its height, has begun and in large part completed a heavy wooden bridge or structure around the two sides of said building, fronting on Nassau and Beekman streets, a part thereof being directly in front of the premises occupied by the plaintiff.

This structure is, however, but temporary in its nature, and is placed there for the protection of those who have occasion to use the street during the course of the building operations. Under the regulations of the building department, the defendant must erect such a structure if he desires to make the proposed alterations and additions which he has undertaken. § 80 of the Building Code, enacted pursuant to § 647 of the Greater New York charter.

It is contended by the plaintiff that this proposed wooden bridge will seriously impair his enjoyment of the demised premises by cutting off his light and air to a great extent and by lessening the value of his leasehold in that ingress and egress will be made more difficult, and the view of the premises to passers-by will be obstructed. This may be true to a certain extent, although it is denied by defendant. Nevertheless, I am far from satisfied that the injuries, if any, which will result to plaintiff, by the completion and maintenance of the structure as proposed will be of an irreparable character, or such that plaintiff has no adequate remedy at law therefor. Besides, defendant claims that plaintiff was informed of the proposed alterations before making the lease, and of the nature and character of the structure of which he now complains. It is not claimed by plaintiff that the wooden bridge is more cumbersome than the exigencies of the case or the requirements of the law demand, nor that plaintiff's rights as tenant are being impaired to any greater extent than is absolutely necessary. A continuance of the injunction under the circumstances of this case would seem to me to work a greater hardship to defendant than the vacation of it would to plaintiff. In such a case, under the authorities, the injunction should not be continued. Trustees of Columbia College v.

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Thacher, 87 N. Y. 317; St. Regis Paper Co. v. Santa Clara Co., 55 App. Div. 225, 232; McSorley v. Gomprecht, 30 Abb. N. C. 412.

It would be establishing a dangerous precedent to grant an injunction in every case where, as here, the possible rights and privileges of a tenant are temporarily but not unnecessarily interfered with by proposed alterations and improvements to the landlord's building, even though the tenant may suffer some damage thereby. To hold otherwise would seriously affect future building operations and timely and necessary improvements of buildings. "It certainly is not the doctrine of courts of equity," says Judge Danforth in his opinion in the case of Trustees of Columbia College v. Thacher, *supra* (p. 317), "to enforce, by its peculiar mandate, every contract, in all cases. * * * It gives or withholds such decree according to its discretion, in view of the circumstances of the case."

So, in the present case, I deem it inequitable to continue the injunction and the motion must be denied with ten dollars costs to defendant to abide the event, and the injunction heretofore granted vacated.

Motion denied, with ten dollars costs to abide event and injunction vacated.

ALEXANDER RIXA, Plaintiff, *v.* JOHANNA RIXA, Defendant.

(Supreme Court, New York Special Term, June, 1901.)

Divorce — Rights of corespondent under Code C. P. § 1757.

The Legislature intended by Code C. P., § 1757, subd. 2, to give a corespondent, in an action for an absolute divorce, all the rights of a party.

Where a husband sues for an absolute divorce and his wife denies adultery and sets up a counterclaim of his adultery with an unmarried woman and he does not reply thereto, the corespondent is entitled to intervene, answer, and demand and have a jury trial of the issues so far as they affect her.

MOTION for a trial by jury of the issues affecting the corespondent in an action for absolute divorce.

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Hyman & Rosenthal (Alexander Rosenthal, of counsel), for corespondent.

Mayer C. Goldman, for defendant.

BLANCHARD, J. This is an application for a trial by jury of the issues affecting the corespondent in an action for absolute divorce. The action was commenced by the husband against the wife for a divorce on the ground of her adultery. The wife has served an answer denying the adultery with which she is charged and sets up as a counterclaim the adultery of the plaintiff, her husband, with the corespondent, who makes this application, and asks for a decree of absolute divorce. To this counterclaim, the plaintiff has failed to reply. It appears that neither the plaintiff nor defendant served a copy of the answer, in which the corespondent is charged with adultery with plaintiff, upon such corespondent, as was their privilege under section 1757 of the Code, but she, having heard of the charges against her, voluntarily appeared by her attorneys and demanded service of all papers, and thereafter served her answer, denying under oath the charges made against her. It seems that without noticing the case for trial as against the corespondent, the cause has been placed upon the Special Term calendar of this court for trial by the defendant. The corespondent has served notice upon the parties hereto, both plaintiff and defendant, that she did not waive her right to a trial by jury of the issues herein, so far as they affect her, and now insists upon such jury trial, both as a matter of right and as a matter calling for the favorable exercise of the discretion vested in the court, for the purpose of vindicating her character. She rests her right under subdivision 2 of section 1757 of the Code, which was an amendment enacted by the Legislature of 1899 (Chap. 661). This act created the right to a corespondent named in any of the pleadings, not theretofore possessed, "at any time before the entry of judgment, to appear either in person or by attorney" and further to "appear to defend such action, so far as the issues affect such corespondent." So far as I am aware, the courts have not as yet been called upon to decide what the rights of a corespondent are, by virtue of this statute. I am of the opinion that when a person is given the privilege of appearing and defending an action by express legislative enactment, he

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thereby becomes a party to such action, and as such becomes vested with all the rights and privileges of a party except as limited by statute. Thus, as an incident to the right to defend, a corespondent would have the right to move for a bill of particulars of the charges against him. In fact, in this case, such step was taken by the corespondent, and it does not appear that such right was questioned by any party hereto. Likewise, I am of opinion that the corespondent would have the right to receive copies of all papers affecting her rights in the action, as, for example, notice of trial, for how otherwise could she be informed of the time of the trial, and her default could not otherwise be taken. In other words, it is my opinion that when the Legislature gave to a corespondent the right to appear and defend, all the incidents of a party defendant necessarily followed. As such party, the corespondent had the right to move for a jury trial pursuant to subdivision 1 of section 1757 of the Code, which provides: "If the answer puts in issue the allegation of adultery, the court must, upon the application of either party, or it may, of its own motion, make an order directing the trial, by a jury, of that issue."

But even though the corespondent had no such right, I should be inclined, of my own motion, in the present case, by virtue of the power vested in the court by that portion of this subdivision of the section just quoted, to grant a jury trial.

Here a young unmarried woman is charged by defendant with adultery, which charges are denied under oath. It is evident that the husband who instituted this action against the honor of his wife intends, by his default, to permit his wife to obtain the divorce upon her countercharge, in which the honor of the applicant upon this motion is involved. There would be thus spread upon the records of this court a most serious blemish upon the fair name of the applicant. The court will, therefore, give her the benefit of the fullest scrutiny of the alleged acts of adultery, and, since it is her desire to meet these charges before a jury, the court will make the order for that purpose.

The motion is granted, with ten dollars costs to the corespondent against the defendant to abide the event.

Motion granted, with ten dollars costs to corespondent against defendant to abide event.

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AUSTIN B. FLETCHER et al., Plaintiffs, v. JOHN McKEON et al., Defendants.

Matter of the Application of JAMES A. ROBINSON, Receiver, Appointed in the Above-entitled Action.

(Supreme Court, New York Special Term, June, 1901.)

Foreclosure — Rent, as between a receiver of the rents and profits and a tenant who had paid in advance.

Where a tenant of the whole of mortgaged premises has paid the rent therefor in advance to the mortgagor, a receiver of the rents and profits, appointed under a clause in the mortgage authorizing such appointment on foreclosure, cannot prevent the tenant from collecting the rents of the subtenants during the period of the tenant's advance payment, and this although the mortgage was recorded before the lease.

The tenant's rights are not cut off until the sale in foreclosure and the receiver has no right to rents paid the mortgagor before the receiver's appointment.

APPLICATION for an injunction.

Austin B. Fletcher (Joseph M. Lesser, of counsel), for plaintiffs and receiver.

Ralph Nathan, for lessee.

BLANCHARD, J. This is an application made by a receiver of rents of mortgaged premises, appointed in an action to foreclose the mortgage, to enjoin a defendant claiming to be a tenant of the entire premises, from collecting the rents of the premises from subtenants and from interfering with the receiver in the collection of these rents. The tenant claims to be in possession of the mortgaged premises by virtue of a lease of the entire premises, under which he has paid to a former owner of the equity of redemption the rent of said premises in advance for several months and up to August first of the present year.

The receiver contends that he is entitled to the rents of the mortgaged premises as against the lessee, because of the fact that

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the mortgage under foreclosure was made and recorded prior in time to the lease, and that, therefore, the lessee took subject to all the provisions of the mortgage, including that clause, by virtue of which the mortgagee is given the right to apply for a receiver of the mortgaged premises in an action brought to foreclose the mortgage. This may be true, and yet the receiver so appointed acquires no rights to the rents paid to the owner of the equity prior to his appointment. The receiver is only entitled to collect such rents as have accrued and have not come into the hands of the owner of the equity of redemption. Wyckoff v. Scofield, 98 N. Y. 475; Rider v. Bagley, 84 id. 461.

The tenant produces his written lease, which acknowledges receipt of the rent of the demised premises for the months of March, April, May, June and July, 1901, and the *bona fides* of the lease is not attacked on this motion. The case of Hartley v. Meyer, 2 Misc. Rep. 56, while holding that a lessee who has paid rent in advance to the owner of the equity of redemption, does so at his peril, in so far as he is charged with notice that his rights may be cut off by the default of the mortgagor and the foreclosure and sale of the property, but a careful examination of the case discloses that it is not therein held that the lessee's rights are cut off prior to the judgment of foreclosure and sale. No case which goes to that extent has been called to my attention, and I have not been able to find any, and the contrary seems to have been held in Lawrence v. Conlon, 26 Misc. Rep. 44, 46. The motion is, therefore, denied, but in view of the motion having been made pursuant to dicta of mine on a previous motion, without costs.

Motion denied, without costs.

CLIFFORD L. MILLER, Plaintiff, *v.* ANDREW SCHMITT et al., Defendants.

(Supreme Court, New York Special Term, June, 1901.)

Mechanic's lien — Discharge by undertaking where there are several owners — L. 1897, ch. 418, § 18, subd. 4.

Where a mechanic's lien is filed against property, consisting of two lots owned separately, for work, labor and materials furnished

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thereon to a person who has contracted to buy both lots, it is not necessary that all three of the "owners" should execute the undertaking required by the Lien Law to discharge the lien and any one of them may do so.

ACTION to foreclose a mechanic's lien. Motion for an order directing in what sum an undertaking must be given to discharge the lien.

Miller, Decker & Miller (James S. Miller, of counsel), for plaintiff.

W. Stebbins Smith, for defendant Schmitt.

Forster & Speir, for defendant Ahr.

Warren S. Bartlett, for defendant McKisch.

BLANCHARD, J. This is an action brought to foreclose a mechanic's lien. The property consists of two lots, one formerly belonging to defendant Schmitt and the other to defendant Ahr. Each agreed to sell his respective lot to the defendant McKisch by written agreement. The defendant McKisch proceeded to build houses upon the two lots, the front portion of the houses being on the lot of Ahr and the rear portion on the lot of Schmitt. As McKisch did not pay to the plaintiff the money due to him for the goods sold to him by plaintiff, the lien in question was filed. The defendant Ahr makes this motion for an order directing in what sum an undertaking must be given to discharge the lien, and proposes that Ahr alone shall give the bond. The plaintiff contends that this cannot be done by Ahr alone, but must be done by all the owners, to-wit: Ahr, Schmitt and McKisch. The question, therefore, to be decided is whether any owner of property on which there is a mechanic's lien may become the principal of a bond for that purpose or whether all the owners or parties interested must unite in the bond as principals. Subdivision 4 of section 18 of chapter 418 of the Laws of 1897 provides that a lien may be discharged by the owner executing an undertaking with two or more sufficient sureties to the clerk of the county in such sum as the court may direct, and section 2 of the same act defines the meaning of the term "owner." It provides that the term "owner" includes the owner in fee of real

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property or of a less estate therein, a lessee for a term of years, a vendee in possession under a contract for the purchase of such real property, and all persons having any right, title or interest in such real property which may be sold under an execution in pursuance of statutes relating to the enforcement of liens of judgments, and all persons having rights to certain specified franchises. It will thus be seen that the term "owner," as defined by the law under consideration, is a comprehensive term, and it was doubtless the intention of the Legislature to give the same opportunity to the owner of any of these interests or parties interested to furnish the bond and to discharge the lien, and not to impose on any one of them the burden of getting all the other parties in interest to unite with him. It follows, therefore, that the motion must be granted. No costs. The amount of the bond will be fixed on the settlement of the order.

Motion granted, no costs.

THE TRAITEL MARBLE CO., Plaintiff, *v.* GEORGE CHASE, Defendant.

(Supreme Court, New York Special Term, June, 1901.)

Landlord and tenant — Condition as to landlord's furnishing power — Injunction.

While a tenant is in lawful possession of premises under a lease by the terms of which the landlord is to furnish him power, the landlord will be enjoined from cutting off the power notwithstanding the fact that differences have arisen between the parties in regard to the payment of rent.

MOTION by plaintiff to restrain defendant landlord from cutting off its supply of power.

Heinsheimer & Falk, for plaintiff.

Thomas W. McKnight, for defendant.

BLANCHARD, J. Plaintiff is in possession of certain premises as lessee, and seeks to restrain defendant, its landlord, from cutting off its supply of power. The lease provides that defendant shall

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supply plaintiff with power sufficient to run certain machines which are necessary to the conduct of plaintiff's business. Defendant claims that plaintiff uses power in excess of that to which it is entitled, but, if such be the case, defendant has other remedies than the drastic one of discontinuing its supply altogether. As long as the plaintiff is in lawful possession of the demised premises the defendant must perform all the terms and conditions of the lease under which the plaintiff is in possession of them. But defendant further claims that the rent remains unpaid by plaintiff, to which, however, plaintiff replies that it has reason not to pay it. Defendant has chosen the Municipal Court as the arbiter of those issues. On the termination of those proceedings the defendant may apply to this court for a modification of the injunction order, if he so desires, but until that time I think the injunction should continue. An order may be entered continuing the injunction as herein indicated, and to that extent the motion is granted, with ten dollars costs to abide the event.

Ordered accordingly.

JULIA DIEHL, as Administratrix, etc., Plaintiff, *v.* ANDREW ROBINSON, Defendant.

(Supreme Court, New York Special Term, June, 1901.)

Amendment — Of answer, denied for defective papers and laches.

A motion to amend an answer must be denied where the proposed amended answer is not verified by the defendant, where he does not make the affidavit for the motion, and where no reason is disclosed why he did not.

Such a motion, involving the denial of matter theretofore admitted, should not be granted where the defendant does not make it until the case is on the day calendar for trial.

APPLICATION by defendant for leave to amend answer.

Browne & Sheehan (Frederick W. Block, of counsel), for plaintiff.

Nadal, Smyth & Carrere (L. Sidney Carrere, of counsel), for defendant.

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BLANCHARD, J. This is an application by defendant for leave to amend his answer by withdrawing therefrom an admission as to the elevators being in charge of and under the control of and operated and managed by defendant, his agents, servants and employees, and substituting therefor a denial thereof. The proposed amended answer is not verified by the defendant, nor does the defendant make the affidavit upon which the motion is made. Neither do the moving papers disclose any reason why the affidavit is not made by defendant. The motion, therefore, must be denied. Aborn v. Waite, 30 Misc. Rep. 317. Besides, I am convinced, from a careful consideration of the facts presented on this motion, that to allow the amendment permitting defendant to deny that which he has previously admitted, and upon which admission plaintiff has rested down to the present time, the case being on the Day Calendar for trial, would not be "in furtherance of justice," as provided by section 723 of the Code. Smith v. City of Athens, 74 Hun, 26. The motion must be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

CHARLES C. DICKINSON, as Assignee, etc., Plaintiff, *v.* EUGENE M. EARLE et al., Defendants.

(Supreme Court, New York Special Term, June, 1901.)

Reference — Referee cannot have an interest in the stenographer's fees — Excessive fees.

Where, at the beginning of a case, a referee therein makes a bargain with the stenographer for a share of the fees payable for copies of the testimony, the report of the referee must be set aside, as such an agreement is wrongful upon his part, casts suspicion upon his impartiality, tends unduly to prolong the reference, contributes to the admission of irrelevant and immaterial evidence and is a fraud and imposition upon the parties.

A referee is to be censured for extravagant charges where, the amount of his fees having been left open at the commencement of the case, he endeavors after it has been closed to have his fees fixed

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by stipulation at $20 for each of 97 hearings, 68 adjournments and 94 days of deliberation upon his report, and subsequently reports in favor of the party who signed the stipulation and paid the fees, the opposing party having declined to sign.

MOTION for an order vacating and setting aside the referee's report, and vacating a judgment entered upon said report, and directing the clerk to cancel the docket thereof, by reason of the acts of the referee, and for an order appointing another referee herein, to hear, try and determine the issues in this action.

H. D. Luce, for plaintiff.

Truax & Crandall, for defendant Eugene M. Earle.

Cardozo Bros., for defendant W. Pell Earle.

FREEDMAN, J. This is a motion for an order vacating and setting aside the referee's report herein, filed March 30, 1901, and vacating a judgment entered upon said report, and directing the clerk to cancel the docket thereof, by reason of the acts of the referee, and for an order appointing another referee herein to hear, try and determine the issues in this action. This motion is based upon acts of alleged misconduct on the part of the referee appointed to hear and determine and fix the amount of compensation and expenses which should be allowed the plaintiff herein as assignee of the defendants. The commission of the acts charged is not denied. In fact, an affidavit made by the referee, on an appeal taken by him from a taxation of his fees, is made a part of the moving papers on this motion, in which affidavit he substantially admits the offenses of which he is accused, and shows an entire unconsciousness of the ethics of his profession and a total disregard of the consequences of his improper conduct. The history of the litigation in this action, with its interruptions, adjournments and expenses, has been gone into at considerable length by the respective parties herein, each side charging the other with the practice of dilatory tactics, but for the purpose of the determination of this motion, a reference to only a portion thereof need be made.

The referee herein was appointed on May 26, 1898. A long and bitter litigation ensued. Nearly three years was taken up

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in hearings had at various times. At the first hearing before the referee, the plaintiff's attorney proposed that a stipulation be entered into, to the effect that the referee might fix the amount of his own fees. The attorney for one of the defendants suggested that any such stipulation would be without legal effect, unless the per diem compensation was stated therein. A stipulation was finally dictated and entered in the minutes, but not signed by any of the parties, to the effect that the referee might fix such fees for himself as might be reasonable, and in so doing should not be limited to the statutory fees, no mention being made of any per diem charge. After the testimony was all taken and submitted to the referee for his decision, and before such decision was rendered, he called at the office of one of the defendants' attorneys and presented a written stipulation fixing the amount of his fees at the sum of $20 per day for each day spent on the hearing and in the examination of the case and of briefs of counsel and for each adjournment.

When this stipulation was so presented, the referee stated that the plaintiff's attorney was willing to sign it.

The defendants' attorneys refused to sign such stipulation.

On March 30, 1901, the referee filed his report, in which he fixed the amount of his fees at the sum of $5,180.

He made oath, upon the taxation of the costs herein, that there were 97 days on which evidence was taken, 68 adjournments, and that, in examining the testimony and the briefs of counsel and preparing his report, he spent 94 days. For this total of 259 days he charged $20 per day.

It appears that the plaintiff consented to and paid the referee the amount claimed by him. The clerk subsequently reduced the amount to $10 per day, and, upon an appeal from such reduction by the clerk, the Special Term overruled the appeal, and Mr. Justice O'Gorman, before whom all the facts were laid, said, among other things, "the criticism of defendants' counsel that the fees charged were extravagant and exorbitant, finds ample justification in the papers used on this motion."

It further appears that thereafter, and some time in April, 1901, one of the defendants' attorneys met Mr. George A. Haynes, who had acted as stenographer during the latter portion of the trial, and in conversation with him learned, for the first time, of a secret understanding and agreement entered into and

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existing between the referee and the stenographers who had taken the testimony in the case, by which the referee was to, and did, receive a part of the stenographers' fees.

Under a stipulation between the parties, one-half of the stenographers' fees was to be paid by each party, as the trial progressed, and the payments of the prevailing party were to be taxed as part of the costs and entered in the judgment. The total amount of the stenographers' fees was $2,446.96.

As to the fact that the agreement aforesaid was made there is no question. Mr. Haynes, who refused to sign or verify an affidavit stating the facts as to such agreement, was ordered to appear before a referee appointed for that purpose, and his deposition was taken. This deposition not only establishes the truth of the existence of such an agreement, but the payment of the referee's portion of such fees by checks sent the referee and also a letter from such referee demanding his share of said fees.

Haynes testifies that the stenographer first employed, who is now dead, was a man named Copp; that Copp became ill and unable to attend the trial; that he (Haynes) was employed as a substitute; that when he first saw the referee the latter said, "I suppose you know the understanding between Copp and me"; and that he (Haynes) replied he "knew of no understanding." The conversation that ensued is stated in said deposition to have been as follows: "The referee said, 'Well, Copp gives me one-third of his fees.' Q. What did he say he wished you to do in the matter? A. I said 'I cannot do any such thing as that'; that is a thing I would not think of doing. I never paid a referee any commission at all. * * * Q. What was the amount he stated? A. One-third of the stenographers' bill. Q. Did you subsequently make an arrangement with Mr. O'Brian about a share of your fees? A. I told him that I considered I was doing the case for Mr. Copp; I was taking his place, and that the best I could do in anything of that kind would be to allow Mr. Copp or whoever represented him one-third of the first copy. * * * Q. And now, so that the court may understand, what is meant by one-third of the first copy? A. The first copy in a case is charged at the rate of twenty-five cents a folio. The second or subsequent copies are charged at the rate of five cents a folio. I told Mr. O'Brian that I would allow him (or at least Mr. Copp) because I could not consider myself as allowing any-

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thing to a referee, one-third of the first copy only and nothing further than that. Q. What did Mr. O'Brian say? A. He said 'all right then, if that is the best you can do, we will settle it at that.' * * * Q. Did he say this, 'that if you were employed he would expect you to do the same as the other stenographer had done'? A. Oh, he made that very plain. Q. And gave you to understand that you would not get the job unless you did so? A. Oh, yes, he made that very plain."

Nor is this all the testimony bearing on that subject. A portion of the affidavit before referred to, made by the referee and used on the motion for a retaxation of his fees, is as follows: "that he is the referee duly appointed in the above entitled action, to hear, try and determine the same; that some time previous to deponent's appointment as referee in this action he was appointed referee in another matter; that one Samuel Watters was in the office with deponent in the Mail & Express building, 203 Broadway, and knowing of this reference, said to deponent, that he knew of a good stenographer, one who would do good work and '*would be willing to give up a portion of his fees.*' That thereupon deponent said to Watters, 'send the man to me.' That thereafter a gentleman came to deponent and introduced himself as a Mr. Copp, the stenographer referred to by the aforesaid Watters. That after some talk about the amount of work there might be in the reference (not, however, this reference) the said Copp then said to deponent relative thereto, 'I will allow you one-third of my fees.' Afterwards and upon being appointed referee in this case, Mr. Copp commenced to take testimony in this case, and continued until he was unable longer to do so because of ill health. He then informed me that he would send to me Mr. Haynes, a competent stenographer to go on with the work. *He further said that he had, or that he would explain to Mr. Haynes the arrangement between him and deponent, and would get Haynes to consent thereto.* That at the hearing following in this case, Mr. Haynes appeared and took testimony. At the end of the hearing, or some time afterwards, deponent asked Haynes if Mr. Copp had told him of the arrangement between him and deponent, to which Mr. Haynes replied, he had not, or that in substance. He said further that he wanted to know whether or not he was to continue taking testimony in the case regardless whether or not Mr. Copp's health would permit him to return.

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Deponent then said to him that owing to Mr. Copp's unfortunate condition he did not think it wise to continue him again lest he break down in health and Mr. Haynes might consider himself the stenographer in the case until the finish, as under no circumstances would deponent reinstate Mr. Copp because of his fear that he might again collapse. Then Mr. Haynes said, 'What was the arrangement that you had with Mr. Copp?' Deponent replied to that — that Mr. Copp had, without any solicitation on the part of deponent, agreed to give deponent one-third of his fees. Then Mr. Haynes said, 'Well as long as I know I am to be stenographer in the case I will give one-third.' Deponent further says, that at no time or place did he say to Mr. Haynes, that unless he consented to the arrangement that had been made between deponent and Mr. Copp, that he, Haynes, could not act as such stenographer."

This agreement was fulfilled. From time to time Haynes paid the referee his stipulated proportion of the fees. One check of $100 was produced and annexed to the deposition, and upon the occasion when the defendants had paid their share of the stenographers' bill in full, the referee wrote the following letter:

"My Dear Haynes:— Congratulations. am damned hard up, wish you would send me check endorsed correct as to endorsement. I make 8137 folios at 8⅓ $511.08 of which I have had $296 leaving $215.08. Send me check so that I get it to-morrow morning. Yours sincerely,

"M. O'Brian."

As testified to by Mr. Haynes, the cause for the congratulations with which the foregoing letter opens, was the receipt by Haynes of the final payment that was due on his bill from the defendants.

Although the referee denies that he ever suggested to either of the stenographers that they should pay him any portion of their fees, such denial has but little bearing upon the main question involved herein, and, in view of his own sworn statement that he actually sought for a man whom he had been told "would be willing to give up a portion of his fees," that he directed his informant to "send me the man," and the proof of the receipt by him of over $500 paid by Haynes out of the fees paid to Haynes, such denial is worthy of but little credit.

The plaintiff herein does not in any way attempt to defend the

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referee in this most extraordinary conduct. He gives a long history of the case, states the large amount of expense already incurred, and the additional time and expense a new trial would entail, claims that he is innocent of wrongdoing, and that the fact that the stenographers made a private arrangement for giving the referee a share of their fees, should not affect the legal rights of the plaintiff, and that such agreement has had no effect upon the rights and interests of the litigants, nor influenced the action of the referee in any way. There can be no question but that this litigation has been long, costly and vexatious, that a new trial will cause delay and additional expense, but all the reasons urged by the plaintiff as grounds for refusing to grant the relief asked for by this motion shrink into comparative insignificance, when we consider the other side of the question. Here is a sworn officer of the law, who stands *pro hac vice* as judge of this court and makes a bargain, at the beginning of a case, with the stenographer, for a share of the fees to be paid for copies of the testimony. That such an agreement constitutes wrongdoing on the part of the referee, tends to unduly prolong the reference, contributes towards the admission of irrelevant and immaterial evidence, casts suspicion upon the fairness and impartiality of the referee and is a fraud and an imposition upon the parties needs no argument. Such a pernicious and vicious practice cannot be permitted to go unnoticed. The reservation of a secret profit by one who occupies a trust position, is recognized as an act of fraud, not only by the courts, but by all known standards of honor, and the courts cannot afford to exact a lower degree of fidelity and a lesser standard of honor in one of its officers who has been authorized to sit in the capacity of a judge, merely because it will create additional expense by a refusal to indorse such behavior.

The plaintiff says in his brief, that this is a pioneer case, that there are no cases reported in the books that parallel the question here submitted, and that in all cases in which a referee's report has been set aside, it has been upon the ground of misconduct by the referee with one of the parties, or improper claims or demands made by the referee with reference to his report. Hoping and assuming that this is the first case of this character upon record, a reference to a few cases involving the same general principle will show the manner in which the courts

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have heretofore decided questions of this nature, viz: "the question here was not whether the referee was guilty of actual corruption, but whether the fairness of his decision was justly questioned. *It is the set* law of this state that any indiscreet action of a referee, from which improper inferences can be drawn suffices to set aside his report." Reynolds v. Moore, 1 App. Div. 106, 108; Yale v. Gwinits, 4 How. Pr. 253; Dorlon v. Lewis, 9 id. 4; Roosa v. S. & W. Turnpike Co., 12 id. 297; Greenwood v. Marvin, 29 Hun, 99; Carroll v. Lufkins, id. 17; Burrows v. Dickinson, 35 id. 492; Livermore v. Bainbridge, 14 Abb. (N. S.) 227.

In Roosa v. Turnpike Co., the court said: "But it is scarcely less important that the conduct of those to whom its administration is entrusted, should be such as to furnish those who litigate no just grounds for suspicion."

In the case of Leonard v. Mulry, 93 N. Y. 392, the referee, after filing his report, entered into an agreement with the successful party, whereby his fees were to be paid out of the proceeds of the judgment when collected. It was held that this was ground for vacating his report, since it disqualified him from settling the case, and gave him an interest in the outcome. The court, in writing the opinion, says, among other things: "He might be affected by it unconsciously, and the rule of exclusion has regard, not so much to the motives which in any given case may be supposed to bias the judge, as to the apprehensions or even the over-anxious suspicions of litigants and the preservation of confidence in the administration of justice."

To the same effect is the decision in the case of Fortunato v. Mayor, 31 App. Div. 271, 274.

Nor should this referee escape censure for the course pursued by him in endeavoring to have the amount of his fees agreed upon by the attorneys for the respective parties. After the case was closed and the evidence submitted to him for decision, he lays before the defendants' attorneys a stipulation fixing his fees at $20 per day, not only for every session, but for every adjournment and a large number of days claimed by him to have been spent in consideration of the case.

He couples with his demand a statement that the attorney for the plaintiff is willing to and does approve of such a stipulation. Upon a refusal by the defendants' attorneys to sign the agree-

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ment, a report is made in favor of the party who has approved of it, and the fees charged therein are paid by the plaintiff at the rate of $20 per day for hearings, consideration and adjournments — hearings of 97 days, 68 adjournments and 94 days in examination of testimony and preparing report.

It is true that an agreement was entered upon the minutes at the commencement of the trial that the referee should not be limited to his statutory fees, but might make such a charge as was reasonable therefor, but it cannot with reason be said that such stipulation contemplated the charge for every adjournment, at the same compensation as for days spent upon the hearings, nor did it contemplate the extraordinary charge for about 94 days spent in the examination of testimony taken at only 97 days of hearings. Such stipulation so entered as aforesaid furnishes no excuse for the conduct of the referee nor for making what Mr. Justice O'Gorman justly characterizes as "extravagant and exorbitant" charges. These acts of the referee can hardly be distinguished from those in the case of Greenwood v. Marvin, 29 Hun, 99.

In that case the referee, after the case had been closed and submitted to him, and before he had decided it, applied to the parties and their attorneys, orally and by letter, to have his fees fixed at a sum in excess of the sum which he would have been entitled to receive, if they were determined by the statutory rates, and sought to procure the execution of a stipulation to that effect.

The plaintiff and one defendant seemed willing, while the other defendant refused to execute it. Subsequently the referee notified the defendant who had expressed a willingness to execute the stipulation, that he would deliver the report to him on receipt of a sum greater than the statutory fees. Thereafter a bond and mortgage was given the referee by said defendant and his son to secure said fees, and the report was delivered to him. It was claimed that the referee had expressed an opinion favorable to the defendant, against whom he finally decided. It was held that the court properly set aside the report and the judgment entered thereon. In the opinion the court says: "The policy of the law in guarding judicial trials from evil, and appearance of evil as well, require that such conduct as has been disclosed should be condemned, and that a report following such conduct should be set aside and the parties remitted to another trial. Confidence

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in the purity of the administration of the law cannot be maintained if such conduct be tolerated and reports allowed to stand, made by referees who start negotiations and stipulations for extra statutory fees, after a case has been submitted to them. Referees ought, like jurors, to be vigilant to avoid evil, to avoid taking a line of conduct which may affect their freedom of mind and neutrality in the cases under consideration. *Ex parte* treaties and conversations with either party as to any fact, point or fee ought to be avoided. Suitors have a right to an unbiased tribunal approaching the delicate duty of determining the facts and the law in a case, uninfluenced by any solicitude or efforts to secure extra fees."

It is clear that courts have ever been ready to guard the rights of parties, to protect their interests and to promptly resent any improper or even suspicious conduct on the part of referees. The principle involved is the preservation of the purity and integrity of justice, as administered by the courts, and the maintenance of the rectitude and dignity of its officers.

The fact that the plaintiff has actually paid the full amount of the referee's fees has no force. The courts have made provision for his relief in a case of this kind. Duhkrokop v. White, 13 App. Div. 295.

To sustain this judgment would be equivalent to notifying every referee that he is at liberty, by extortionate demands and secret reservations, to enrich himself at the expense of the litigants.

The relief as asked for by this motion is granted.

Motion granted.

JAMES STORY et al., Plaintiffs, *v.* MARY E. ARTHUR et al., Defendants.

(Supreme Court, New York Special Term, June, 1901.)

Attachment — Proof where the damages are unliquidated — Merits, when not considered — Laches — Code C. P. § 682.

Allegations that the plaintiffs procured an exchange of real estate for a non-resident defendant and that their services were reasonably worth to her $6,000 are, standing alone, insufficient to support

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an attachment against her property, as the damages are unliquidated and no facts are set forth from which a conclusion can properly be drawn that the plaintiffs have been damaged in an ascertainable sum.

The merits will not be considered upon a motion to vacate an attachment unless the moving papers are hopelessly bad.

Laches cannot be imputed to a defendant in having failed to move promptly to vacate an attachment provided her motion is made "before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action". Code C. P., § 682.

MOTION to vacate an attachment.

C. R. Allison, for motion.

H. F. Lippold, opposed.

GILDERSLEEVE, J. On or about December 1, 1899, this action was commenced, and an attachment procured on the ground of the nonresidence of defendant and for breach of contract. The complaint and affidavits in support of the attachment allege that defendant Arthur employed the plaintiffs to procure an exchange of real estate; that plaintiffs procured such exchange, in accordance with the directions of said defendant, and that their services are reasonably worth the sum of $6,000. The said plaintiffs had the attachment levied on real estate in this city belonging to said defendant, and filed a *lis pendens*. On or about October 1, 1900, said defendant became a resident of this city. She now makes this motion to vacate the attachment. It is claimed that she has not specified the irregularities complained of in her moving papers, as required by rule 37, but she maintains that this application is not based on any irregularity, but upon the merits and on jurisdictional defects. The plaintiffs' cause of action is based on a *quantum meruit*. They claim their services are worth $6,000, but there is nothing to show the value of the property exchanged, or the nature and extent of the services rendered. The damages are unliquidated, and we have nothing but the plaintiffs' assertion that they should be valued at $6,000. The

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rule is well settled that an attachment will not be sustained upon a claim for unliquidated damages, unless the papers upon which it rests set forth facts from which a conclusion can properly be drawn that plaintiffs have been damaged in an ascertainable sum. Farquhar v. Wisconsin Con. Milk Co., 30 Misc. Rep. 270. The court must be able to determine whether plaintiffs have evidence of damages and whether the allegations in respect thereto are mere matter of speculation. Haskell v. Osborn, 33 App. Div. 128. The plaintiffs urge that defendant Arthur is without a meritorious defense to the action. Upon a motion to vacate an attachment, however, the merits of the action will not be considered, unless, indeed, the moving papers are hopelessly bad. Peck v. Brooks, 31 Misc. Rep. 49; Thorn v. Alvord, 32 id. 457, affd., 54 App. Div. 638. The plaintiffs urge laches on the part of defendant in making this application to vacate the attachment. But section 682 of the Code provides that the defendant can apply to vacate the attachment at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action. There is, therefore, no question of laches here. As I have above stated, the plaintiffs have not complied with the rule in cases where the damages are unliquidated. In such cases the papers upon which an application for an attachment is founded must set forth the facts which establish the damages, as the amount of damages must be shown in order to entitle the plaintiffs to an attachment. The papers must allege, not simply the conclusion that the plaintiffs have suffered damage by reason of the breach of contract set forth in the complaint to an amount specified, but must state the facts from which such conclusion may properly be drawn. Farquhar v. Wisconsin Con. Milk Co., *supra;* Westervelt v. Agrumaria, 58 Hun, 147. The motion to vacate the attachment is granted, with ten dollars costs to abide the event.

Motion granted, with ten dollars costs to abide event.

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THE CENTRAL TRUST CO. OF NEW YORK, as Executor, etc., of T. ADDISON RICHARDS, Deceased, Plaintiff, *v.* JABEZ J. RICHARDS et al., Defendants.

(Supreme Court, New York Special Term, June, 1901.)

Will — Construction — Blood of testator preferred.

The second clause of the will of a testator devised and bequeathed the remainder "of my property * * * equally to my brothers and sisters, and their children living at the time of my decease, and also the father and brothers of my beloved wife and their children now living and who may continue to be living at my decease. And in the event of the decease of the issue of any one or more of my brothers and sisters before my decease, including those already deceased, as well as those who may decease, that then the issue of such issue shall take the share which its or their parent would have taken if living at my decease."

Held, that the testator intended his estate to be divided per capita between his brothers and sisters and the children of such of them as might be living at the time of his death, and his wife's brothers and their children living at the time of his death — grandnephews and nieces of one stock together taking the share of their parent.

That the testator did not intend to exclude the children of his surviving brothers and sisters from sharing in his estate and admit thereto children of his wife's surviving brothers, but that both had equal rights.

That if any ambiguity had existed, that interpretation would be adopted which preferred the blood of the testator to strangers.

ACTION for the construction of a will.

Butler, Notman, Joline & Mynderse (Arthur H. Van Brunt, of counsel), for plaintiff.

Martin E. Gill, for defendants Jabez J. Richards and others.

Allan Robinson, guardian *ad litem* for Richards infants.

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Robert D. Murray, guardian *ad litem* for Perkins infants.

William H. Fain, for defendants William H. and Clarence J. Anthony.

Merle I. St. John, for defendants G. L. and W. A. R. Anthony.

H. H. Bingham, for defendants Henry P. and Frank H. Anthony.

LAWRENCE, J. This action is brought to obtain a construction of the second clause of the will of T. Addison Richards, deceased. That clause reads as follows: "*Second.* I give, devise and bequeath the rest, residue and remainder of my property, real, personal and mixed, equally to my brothers and sisters, and their children living at the time of my decease, and also the father and brothers of my beloved wife and their children now living and who may continue to be living at my decease. And in the event of the decease of the issue of any one or more of my brothers and sisters before my decease, including those already deceased, as well as those who may decease, that then the issue of such issue shall take the share which its or their parent would have taken if living at my decease." The testator left surviving him two brothers and two sisters, twenty-nine nephews and nieces, some of whose parents were living and some deceased at the date of testator's death; two grandnephews, the children of a deceased daughter of testator's deceased brother, and one grandniece and three grandnephews, the children of a deceased son of testator's living sister. There were also living at the date of testator's death three of his deceased wife's brothers, of whom one had two sons, another one son and the other no children. The deceased daughter of testator's deceased brother and the deceased son of testator's living sister were dead, with no children surviving them, at the date of the execution of the will. The testator's wife's father died before him. The guardian *ad litem* of the infants, Harold Richards, Lucy R. Richards and Charles B. Du Bose, nephews and a niece of the testator, has filed a general answer as guardian *ad litem*, and the attorney for the brothers and sisters of the testator and of their children has filed an answer alleging that the nephews and nieces of the testator take *per capita*

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in equal shares with his brothers and sisters and the brothers of his wife and their sons, and that all his nephews and nieces take, whether the children of brothers or sisters who died before him or who survived him. The guardian *ad litem* of the Perkins infants, children of a deceased daughter of a deceased brother of the testator, has served an answer in which he claims that the children of the testator's surviving brothers and sisters and the sons of the brothers of testator's wife take nothing under the will, and claiming, as a result of that position, that the estate should be divided into sixteen shares, and that each of said infants is entitled to one-half of one share, being one thirty-second part of the estate. The defendant Frank H. Anthony, a nephew of testator's wife, has served an answer alleging that, under the testator's will, the children of the testator's living brothers and sisters are excluded from any share in his estate, but that the children of the living brothers of testator's wife are included by the terms of the will and entitled to take thereunder. In regard to the claim that the testator intended that the children of the living brothers of his deceased wife should stand on a more favorable footing than the children of his own living brothers and sisters, I deem it sufficient to say that I do not think that it can be sustained. It is elementary that where a will is capable of two interpretations that one should be adopted which prefers those of the blood of the testator to strangers. Wood v. Mitcham, 92 N. Y. 375, 379. A reading of the will discloses no intention on the part of the testator to prefer his wife's relatives to his own. Certainly, the provision "And in the event of the decease of the issue of any one or more of my brothers and sisters before my decease, including those already deceased, as well as those who may decease, that then the issue of such issue shall take the share which its or their parent would have taken if living at my decease," evinces no such intention. The testator knew which of his nephews and nieces had died at the time of the execution of his will, and the object of that provision, as I view it, was simply to enable the issue of the deceased children of his brothers and sisters to take the share which their parents would have taken if living at the time of his decease. The rule is, of course, that the court is to be governed in the construction of a will by the intention of the testator, if that can be discovered from its provisions, and it is also the rule that where a general rule of con-

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struction comes in conflict with the intention, the latter should govern. Matter of James, 146 N. Y. 78. In this case there is not, in my opinion, any ambiguity as to the testator's intention. I think it is plain from reading the will that the testator intended that his estate should be divided *per capita* between his brothers and sisters and the children of such brothers and sisters who might be living at the time of his death and the testator's wife's brothers and their children who might be living at the time of his death. See Bunner v. Storm, 1 Sandf. Ch. 357; Murphy v. Harvey, 4 Edw. Ch. 131; Matter of Sanders, 4 Paige, 293; Myres v. Myres, 23 How. Pr. 413, and cases cited. The fact that the will contains an additional provision to the effect that in the event that any of the issue of the testator's brothers and sisters had died leaving issue at the time of his death, such issue should take the share which its parent would have taken if living at his decease, does not in any way conflict with this view. The provision tends rather to strengthen the construction that the testator intended that the children of his brothers and sisters who were living at the time of his death should share with their parents in the distribution of his estate. Otherwise it would seem to be without meaning, for the reason that if the children of the testator's living brothers and sisters were not intended to take under the will, had they survived the testator, it is difficult to see how the issue of such children could take the shares which their parents would have taken if living. If the parents were not to have received shares under the will, surely their issue would have nothing to receive. Assuming that it was the intention of the testator to divide his estate as above indicated, it follows that such estate is to be divided into forty-one shares, and that one of such shares is to go to each living brother and sister and nephew and niece of the testator and each living brother and nephew of his wife. The infants Perkins, the two sons of the deceased daughter of the testator's deceased brother, take one share between them, and the four children of the deceased son of the testator's living sister, Mrs. DuBose, are entitled to the remaining share. Draw decision and judgment accordingly, and settle on two days' notice.

Ordered accordingly.

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DORA GOLDSTEIN, Plaintiff, *v.* PAULINE GOLDSTEIN, Individually and as Executrix, etc., of MORRIS GOLDSTEIN, Deceased, and PAULINE GOLDSTEIN and LILLIE GOLDSTEIN, as Administratrices, with the Will Annexed, of SAMUEL GOLDSTEIN, Deceased, et al., Defendants.

(Supreme Court, New York Special Term, June, 1901.)

Husband and wife — Equitable action by her to enforce, against his legatees and devisees, his promise to provide for her by will if she would abandon separation proceedings — Statute of Frauds.

A parol agreement, made since the passage of the Domestic Relations Law (L. 1896, ch. 272, art. 3, § 21), by the terms of which a husband promises his wife that if she will abandon her proceedings to procure a separation from him, to which she deems herself entitled, and will return to and live with him, he will provide for her by will, when followed by her permanent return to him and his execution of such will, constitutes a valid executed contract which she may enforce in equity against his legatees and devisees under a subsequent will made by him in contravention of the parol agreement.

The Statute of Frauds is not a defense to the action as the wife has made full performance.

ACTION, in equity, by a widow to enforce an agreement of her husband, since deceased, to provide for her by his will in consideration of her abandonment of proceedings to procure a separation from him.

Hamilton & Becket (William H. Hamilton, of counsel), for plaintiff.

Charles I. Schampain, for defendants Amelia Calwin and Flora Mehrenstein.

Messmore Kendall, guardian *ad litem* for all infant defendants.

Samuel Levy, for defendants Pauline Goldstein and Lillie Goldstein, as administratrices, etc.

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M. S. & I. S. Isaacs (Julius J. Frank, of counsel), for defendants Platts.

Gross & Sneudaira, for defendant "Congregation Beth Israel."

LAWRENCE, J. Under chapter 272 of the Laws of 1896, article III, section 21, a married woman has all the rights in respect to property and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto, with any person, *including her husband*, as if she were unmarried; but husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife.

The contract alleged in the complaint was not within the exceptions contained in the statute, and the question, therefore, arises, assuming that the agreement alleged in the complaint was in fact made, whether the same was valid.

I am of the opinion that the evidence establishes that the husband agreed with his wife that in consideration that she would abandon the proceedings which were threatened by her, and in which steps had been taken for the commencement of an action to secure the separation to which she claimed she was entitled, and return to and live with him, he would make the will which was executed on May 6, 1898. I am also of the opinion that such will constituted an executed contract between the parties, and that the execution of the subsequent will of May 18, 1898, was a fraud upon the plaintiff, and that, therefore, she is entitled to relief in a court of equity.

The evidence shows that the plaintiff, pursuant to the agreement between her and her husband, returned to and lived with him, and that her conduct towards him to the end of his life was that of a dutiful and affectionate wife.

I do not think that the Statute of Frauds can be successfully interposed as a defense to the action. There was a full performance on the part of the plaintiff sufficient to take the case out of the operation of that statute. Parsell v. Stryker, 41 N. Y. 480; Lobdell v. Lobdell, 36 id. 327; Smith v. Smith, 51 Hun, 166; Freeman v. Freeman, 43 N. Y. 34.

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There was an adequate consideration for the agreement on the part of Samuel Goldstein. The plaintiff had, or claimed to have, good cause for obtaining a separation from him. Whether that claim was well or ill-founded I do not think is material. Samuel Goldstein evidently regarded it as well-founded at the time he made the agreement and executed the will of May 6, 1898, and the declaration which he made in the will of May 18, 1898, that the former will was executed to "enable him to live in peace and harmony with his wife during her life" goes far to show that he did not regard her claim to a separation as based upon trivial grounds.

I not only regard the agreement to execute the will of May 6, 1898, and the execution of it, and the delivery of the same to Mr. Chedsey, as based upon a sufficient consideration, but I am also of the opinion that no court of equity should permit the devisees and legatees of the husband, who, by making such an agreement and by carrying it into execution, disarmed his wife and prevented her from prosecuting her action, to profit by the husband's fraud.

Numerous cases are cited in the brief of the respective counsel in support of their position. After examining those cases, I am of the opinion that the plaintiff's case is supported by the decisions enunciated in Gates v. Gates, 34 App. Div. 608; Webster v. Webster, 27 L. J. Ch. 115; same case on appeal, 4 De Gex, M. & G. 437; Korminsky v. Korminsky, 2 Misc. Rep. 138; 21 N. Y. Supp. 611; Davison v. Davison, 13 N. J. Eq. 246; Bruce v. Moon, 35 S. E. Repr. 415; Adams v. Adams, 91 N. Y. 381.

For these reasons, there will be judgment in the plaintiff's favor, as prayed for in her complaint, with costs and allowance, to be settled on the entry of the judgment.

Draw decision and judgment accordingly, and settle on notice.

Judgment accordingly.

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Matter of the Estate of MARY NEIL, Deceased.

(Surrogate's Court, New York County, June, 1901.)

Decedent's estate — Payment of claim against, an affirmative defense — Code C. P. § 829 — Statute of Limitations.

The rule that payment is an affirmative defense applies to a claim for rent of premises occupied by an intestate and, upon a contest in regard to the claim, the claimant need not show that no payments have been made him thereon.

An administrator, claiming as a creditor of his intestate, cannot testify in regard to payments made him by the intestate upon the claim.

The Statute of Limitations is not a defense to a claim for a balance of rent due under an agreement, covering over sixteen years occupation of premises at a fixed monthly rent, any balance due to be payable out of the tenant's estate at her death (occurring in 1900), as the balance does not become due until her death.

PROCEEDINGS upon the judicial settlement of the account of an administrator. Objections filed to the report of a referee.

Norwood & Dilley, for administrator claimant.

Clarence L. Barber, for next of kin contestants.

THOMAS, S. The administrator is a brother of the intestate and makes a claim against her estate which is resisted by certain of the next of kin. It was established by competent evidence and found by the referee that on or about November 1, 1884, the intestate entered into possession of three rooms in her brother's house, in One Hundred and Sixth street, and used and occupied them until her death in February, 1900. The reasonable rental value of these rooms was seven dollars and fifty cents per month, and she commenced her occupancy of them under a contract then made by her with her brother by which she agreed to pay him seven dollars and fifty cents per month for the rent of the rooms as long as she should occupy them, and in the event of his surviving her, her

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estate was to pay the difference between what she might have paid him in her lifetime and seven dollars and fifty cents a month during the time she so occupied his said premises; and in the event of her surviving him, then his heirs were to have no claim against her for back rent. Receipts signed by the brother and in the possession of the intestate at the time of her death showed that the first payment made by her on the rent for the month of November, 1884, was four dollars, and that she paid and her brother received four dollars on the rent for December, 1884, on the understanding that the balance would be payable, pursuant to their agreement, out of her estate at her death. In the account of the administrator his claim was stated as being for rent of rooms, 184 months at seven dollars and fifty cents a month, amounting to $1,380, with a credit of $445, leaving $935, and this statement was one of the allegations covered by his general verification. The objections filed by the next of kin specified as grounds of objection that the claim had been paid and that it was barred by the Statute of Limitations. On the trial before the referee the administrator offered himself as a witness in his own behalf, and when his counsel attempted to examine him as to payments made by the intestate to him, objection was made that he was an incompetent witness as to such matters, because of the provisions of section 829, Code Civil Procedure, and this objection was properly sustained, and the evidence was excluded. The administrator, by his counsel, then put upon the record a waiver of any claim in excess of $935, and subsequently filed a formal proof of claim in which payments sufficient to reduce his claim to that amount were admitted, which was verified by him to the effect that no further payments had been made. No further affirmative proof of nonpayment was offered by the claimant, and the contestants did not offer any evidence of payment in support of their objection. On this evidence the learned referee reported against the claim, feeling constrained so to do because of decisions recited in his opinion. These cases were all actions in the Supreme Court, and, like Lent v. N. Y. & M. R. Co., 130 N. Y. 504, which was the leading authority relied on, most of them concerned questions of pleading arising on demurrers. A case so nearly like the one at bar as to be controlling is Lerche v. Brasher, 104 N. Y. 157, and leads to an entirely different result. That was an action

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against an administrator with the will annexed to recover for services rendered his testator; the services and their value were proved, and the administrator was improperly allowed to testify as to nonpayment. A judgment was rendered, which was set aside by an order of the trial court, affirmed by the General Term, because of the error in receiving this evidence, and the appeal was from this order. The order was reversed, the court, Finch, J., writing, saying: "But while the objection was a good one, the evidence was wholly immaterial. The plaintiff was not required to prove the negative, and payment was an affirmative defense, the burden of establishing which was on the defendant." No authority was cited to support this proposition, but this was not because authorities did not exist in great abundance. Where a contract obligation of a defendant or of his legal representative to pay a sum of money is shown, it has long been the rule that facts of discharge by payment or release are the subjects of affirmative defenses and affirmative proof on the part of the defendant. McKyring v. Bull, 16 N. Y. 297. There are, of course, cases where nonpayment is a fact forming an essential part of a cause of action, and in such cases the negative fact must affirmatively be shown. Such a case was Knapp v. Roche, 94 N. Y. 329, cited by the contestant, where the action was against an officer of a bank for damages for negligently loaning the moneys of the bank to a third person, who failed to pay, and the bank was thus damaged. Another was Ball & Wood v. Clark & Sons Co., 31 App. Div. 356, where a mechanic's lienor sought to establish his lien against the owner, without proof that anything was due from the owner to the original contractor. See also Quin v. Lloyd, 41 N. Y. 349. But in a case where an executor was sued for the value of board and lodging furnished to his testator it was determined by the Appellate Division of this department that the plaintiff was not required to prove nonpayment as a condition for his recovery, and the cases cited by the contestant were by name cited in support of the ruling. Hicks-Alixanian v. Walton, 14 App. Div. 199. See also Matter of Rowell, 45 id. 323; In re Macomber's Estate, 11 N. Y. Supp. 198, aff'd *sub nom.;* Matter of Powers, 124 N. Y. 361. The fact that, by the terms of the contract, the intestate was required to pay either at or before her decease does not change the rule. The obligation was to pay a fixed rent, and in every case of this kind only the balance unpaid can be recovered. The defense

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of the Statute of Limitations cannot prevail because the balance unpaid did not become due until the death of the intestate. The conclusions of the referee disallowing the claim of the administrator will be reversed and the claim allowed. In all other respects the report is confirmed. Costs of the administrator will be paid out of the estate.

Decreed accordingly.

Matter of the Estate of CHRISTIAN GROTRIAN, Deceased.

(Surrogate's Court, New York County, June, 1901.)

Dower — Testamentary provision not a bar — Consent to take gross sum — Code C. P. § 2793, subd. 3 — Compensation of attorneys for remaindermen.

A testator's direction to his executors to set apart from and apply out of the income of his estate a fixed annual sum for the support of his wife for life does not, on the face of the will, bar dower.

Where the said fixed sum proved to exceed the entire income of the personal estate and of the real estate after its conversion into money in order to pay the testator's debts, and the widow was an incompetent person, the court refused the application of her committee to be permitted to take a gross sum in lieu of dower as not being proper nor in the best interest of the widow, and it directed that the balance, after payment of the moving creditor, be paid to the executrix of the testator in order to produce the widow's provision.

Where the will directed that, after the death of the widow, the estate should be divided among collaterals, the court held that the claims of their attorneys against them for services could not be considered, while the widow was living, in the proceeding to sell the testator's real estate.

APPLICATION of the executrix of Christian Grotrian, deceased, for a distribution of the proceeds of the sale of his real estate for the payment of his debts. The second clause of his will provided: "I direct that my executors set apart and apply out of the income of my estate the sum of three hundred and twenty-five dollars every three months for the benefit of my wife Louise

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Grotrian, which sum shall be used for the care, support and maintenance of my said wife Louise Grotrian during her life." The will also gave a general legacy of $1,000 to Louise Mundt, his niece. It also directed that after the death of his wife all his residuary estate, including realty, should be sold and divided among certain of his nephews and nieces. Other facts appear in the opinion.

John E. Brodsky, for executrix.

Carter, Hughes & Dwight, for residuary legatees.

Aaron Kahn, for residuary legatees.

Gratz Nathan, for special guardian.

THOMAS, S. I concur in the opinion of Surrogate Varnum, rendered when this matter was before him, that on the face of the will the annuity directed to be paid to the widow does not bar her claim to dower. Matter of Grotrian, 30 Misc. Rep. 23. At that time an order was made appointing appraisers. A decree was thereafter made by Surrogate Fitzgerald directing a sale of part of the real estate of the testator, and the present application is for a decree directing as to the disposition of the proceeds of such sale. The widow is an incompetent and appears by her committee. It is now shown that the amount directed to be paid to the widow exceeds, and has at all times since the death of the testator, in 1892, exceeded the entire net income of his estate. It is not now necessary to determine whether this payment was an annuity or a trust provision. Cochrane v. Schell, 140 N. Y. 516. The committee of the widow asks that an order be made directing him to execute an instrument on her behalf electing to take from the proceeds of the sale of the property sold a gross sum equivalent to the present value of her right of dower, and that such gross sum be paid to him, leaving the balance, if any, in the hands of the executrix to raise further income for her. Such an order can be made upon proof that it will be for the best interest of the widow (Code C. P., § 2793), and if her right of dower is legally paramount to the provision for her contained in the will. I must determine both of these questions contrary to the contentions of counsel for

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the widow's committee. The annuity or trust sum directed to be paid to the widow is, in fact, though not so expressed in the will, a gift to her for her life of the entire income of the estate. If it had been so expressed it would have been a legal bar to all claim of dower, as being manifestly inconsistent with dower. Matter of Zahrt, 94 N. Y. 605. She is to have the entire income, and whether her title thereto is in part because of the will or in part independent of the will it is not now important to determine. If she has the full income, and is to retain it, there is no propriety in giving her a part of the principal in lieu of a part of the income not given up, except as the transaction diminishes the estate from which income is to be obtained. There is also no proof that such a disposition would be to the interest of the widow. As a matter of discretion I will not permit the committee to execute the instrument accepting a gross sum out of the estate. I also agree with Surrogate Varnum that the pecuniary legacy to Louise Mundt is not charged upon the real estate, and cannot be protected in this proceeding. Matter of Grotrian, *supra*. The fund, after payment of the amount due to the petitioner and the costs of the proceeeding, will be directed to be paid over to the executrix to be held, invested and paid out in pursuance of the directions contained in the will of the testator as to the real estate from which said fund was derived. The rights of the other legatees cannot be determined until they become due, which will not be until the death of the widow. For this reason the claims of counsel for such legatees as against their clients cannot be enforced in this proceeding. The balance of the claim of the petitioner, with interest and his taxable costs, and an allowance to the special guardian for the infant parties not exceeding taxable costs, to be hereafter fixed, and the taxable disbursements of all the parties will be paid out of the fund. The great loss caused by the sale and the necessary costs of this proceeding could have been averted by a small sacrifice on the part of any of the adult parties in interest. Without attempting to apportion the fault I will refuse any costs, except as above stated, to any of the parties in interest. Settle decree and tax costs on notice.

Decreed accordingly.

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Matter of the Judicial Settlement of the Accounts of the UNION TRUST CO. of New York, as Trustee of the Estate of GEORGE P. LAWRENCE, Deceased.

(Surrogate's Court, New York County, June, 1901.)

Executor — Commissions refused as trustee.

Where the provisions of a will manifestly contemplate the continued co-existence and exercise of the duties of executor and those of trustee until the distribution of the fund, commissions will be awarded only in a single capacity, and where they have been awarded, upon his accounting, to one as executor only, an unauthorized direction of the decree that the balance be paid over to a trust company as "executor and trustee" cannot enlarge the company's rights to commissions nor entitle it, upon the settlement of its accounts, to commissions in both capacities.

PROCEEDINGS upon the judicial settlement of the accounts of a trustee. Application for double commissions.

Peckham, Miller & King, for motion.

Edwin C. Ward, for Lawrence Crawford.

William B. McNiece, special guardian, opposed.

THOMAS, S. The trust company, on the settlement of the decree, asks for commissions as trustee. The question as to the right of its predecessor to commissions both as executor and trustee was raised on the accounting leading up to the decree of September 20, 1897, and was decided by Surrogate Fitzgerald in the negative by a memorandum published in the New York Law Journal on August 6, 1897, in which Johnson v. Lawrence, 95 N. Y. 154, and McAlpine v. Potter, 126 id. 286, were cited as controlling authorities. In the proposed decree then submitted the allowances for double commissions asked for were stricken out by Surrogate Fitzgerald and the erasures noted by him. The provision to the effect that the balance of the estate then remaining should be paid over to the trust company as "executor and trustee" did not create

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rights which did not exist independently of it. It is plain that the surrogate did not intend to determine anything directly to the contrary of his carefully prepared memorandum, or to make a decree intended to form a foundation for double commissions which he had concluded that he had no power to grant. Whatever his intent may have been, the decree did not have the effect of changing in any way the legal rights of the executor or trustee to compensation. McKie v. Clark, 3 Dem. 380. The decree of September 8, 1900, on the accounting of the trust company then made, awards full commissions to the executor, both for receiving and paying out, and directs it to pay the estate to itself as trustee and discharges it as executor. The attention of the surrogate does not appear to have been called to the fact that this was in direct contravention to his decision, and it was not effectual, any more than was the previous decree, to vest in the executor or trustee a right to commissions not given by law. McKie v. Clark, *supra;* Bacon v. Bacon, 4 Dem. 5, 12. I concur with Surrogate Fitzgerald in his conclusion that no commissions can be awarded as trustee for any service rendered by the executor under the will of the testator. Full commissions as executor have already been paid, and no further commissions can now be allowed except on income or other increase received subsequent to the last accounting.

Decreed accordingly.

BYRON TRAVER, Respondent, *v.* VALENTINE P. SNYDER et al., Appellants.

(Supreme Court, Appellate Term, June, 1901.)

Promise for benefit of third person — Consideration — Identity of beneficiary.

Where receivers, appointed in proceedings for the voluntary dissolution of a corporation and in other proceedings to foreclose a mortgage upon all its franchises, premises and property, convey, in connection with the corporation and the sheriff, all its assets for a price insufficient to pay all the expenses of the accounting and discharge proceedings of the two receiverships, and the grantees there-

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upon covenant to pay them, "as and when they may be ascertained", and the receivers covenant "to do all and everything and things which may be necessary to wind up said receiverships", an attorney for the receivers, who has subsequently been awarded by the Supreme Court compensation for services rendered the receivers on their said accountings and discharge, may recover such compensation of the grantees as upon a promise made by them for his benefit, although he had not been retained by the receivers when the grantees made their covenant.

Traver v. Snyder, 34 Misc. Rep. 406, affirmed.

APPEAL from a judgment of the General Term of the City Court of the city of New York affirming a judgment in favor of the plaintiff entered upon direction of the court.

Charles M. Whitney (James L. Bishop, of counsel), for appellants.

Byron Traver, respondent, in person.

Per Curiam. In the year 1896 Francis Higgins and two others were appointed temporary receivers in a proceeding for the voluntary dissolution of a corporation known as the Archer & Pancoast Company. Early in the following year an action was commenced for the foreclosure of a mortgage or trust deed covering the corporate franchises, premises and property of said corporation, and in this action the same receivers were appointed with the usual powers of receivers in foreclosure actions. A judgment of foreclosure and sale was duly entered, and after the requisite advertisement the property was put up for sale and sold to one Charles M. Whitney for the sum of $35,000. This sum was insufficient to pay all the expenses of the receivership and the foreclosure suit, and on March 8, 1899, an agreement was entered into between said Whitney and the receivers. This agreement recited the purchase by Whitney; the fact of the two receiverships, and the further fact that the receivers had not yet accounted and been discharged; that for certain reasons it was deemed important that the purchaser be put into prompt possession of the property, and the several receiverships be terminated as speedily as possible; that the property did not realize at said sale sufficient money to pay

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and discharge in full the expenses of operating the same under said receiverships. Whitney on his part then agreed, among other things, that he would "assume and pay the costs and expenses of the reference provided for in said judgment of foreclosure, and the expenses of the accounting and discharge proceedings in said two receiverships of the said parties of the second part, as and when the same may be ascertained." The receivers, upon their part, agreed, among other things, that they would "do all and every thing and things which may be necessary to wind up said receiverships." On March 23, 1899, the receivers, the sheriff, and the Archer & Pancoast Company each executed an appropriate conveyance to the defendants herein (to whom Whitney had assigned his bid), so that all the property and assets of said company became vested in said defendants. Each of said conveyances contained the following clause: "Provided always, and these presents are made, executed and delivered upon the express condition that in the event that said purchase price of thirty-five thousand dollars ($35,000) is insufficient to pay and discharge in full * * * the expenses of the accounting and discharge proceedings in said two receiverships * * * according to the terms and provisions of the said agreement of March 8, 1899, then and in that case the said parties of the second part, their administrators or assigns will fully pay the same." These several conveyances, although dated March 23, 1899, were not recorded until March 10 and 12, 1900. In the meantime the receivers, as they had agreed to do, took steps to account and have themselves discharged, and retained and employed the plaintiff as their attorney in such proceedings. Their accounts were passed and they were discharged as receivers in the voluntary dissolution proceeding by a final order entered on October 9, 1900, and in the foreclosure proceeding by a final order entered on November 9, 1900. By the former order the sum of $2,000 was allowed to plaintiff as compensation for his services rendered to the receivers in preparing their accounts, and upon their accounting in the two receiverships, no allowance being made to him in the final order in the foreclosure action. It is for this sum that plaintiff now sues. He rests his claim upon the well-established rule laid down in Lawrence v. Fox, 20 N. Y. 268, that an action lies on a promise made by defendant upon valid consideration to a third person for the benefit of plaintiff, although the plaintiff was not

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privy to the consideration. The defendants strenuously contend that the plaintiff cannot recover upon the promise made by the defendants to the receivers to pay the expenses of the accounting because, as they say, the promise was not made for his benefit, inasmuch as that there was not at the time the promise was made any existing obligation in his favor from the receivers, or any certainty that such an obligation would ever arise, or if it did arise what precise sum would ever become due to him from the receivers. It is undoubtedly true that it is not every promise made by one person to another from the performance of which a third party might derive a benefit, that will give a right of action to such third party. Garnsey v. Rogers, 47 N. Y. 235. The promise must have been entered into for the benefit of such third party, or such benefit must be the direct and natural result of performance, and so within the contemplation of the parties, and the promisee must have a legal interest that the covenant be performed in favor of the party claiming performance, or there must be some obligation or duty owing from the promisee to the party to be benefited which would give him a legal or equitable claim to the benefit of the promise or an equivalent from the promisee personally. Vrooman v. Turner, 69 N. Y. 280; Durnherr v. Rau, 135 id. 219. If, at the time the defendants adopted Whitney's promise to the receivers and reiterated it, the plaintiff had already been retained by the receivers to wind up their receiverships and had rendered services in that behalf, he would have been entitled to maintain an action directly against the defendants, under the most stringent limitations which have been applied to the rule in Lawrence v. Fox. His compensation would have been a necessary part of the expenses of the accounting and discharge proceedings, and thus within the letter of the contract. The promise would have been made for his benefit, because such benefit would have been the natural and direct result of the performance of the contract, and the promisees, the receivers, would have had a legal interest that the promise be performed, because the rendition of service to them in the proceedings would have created an obligation from them to the plaintiff giving him a claim either to the benefit of the promise or to an equivalent from the receivers themselves. Does the sole fact that the plaintiff had not yet been retained when the promise was made prevent his availing himself of the rule on which he relies? We think not. It was a

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part of the agreement between Whitney and the receivers that they should do all and every thing and things which might be necessary to wind up the receiverships, and it was recited that it was deemed to be important that the receiverships should be terminated as speedily as possible. They could only be terminated by an accounting and by procuring from the court orders passing the accounts and discharging the receivers. To effect this it was necessary that some attorney should be employed. The fees of such an attorney would necessarily be incurred as a part of the expenses of the proceedings for winding up the receiverships. Hence when Whitney first, and the defendants afterwards, agreed to pay the expenses of the accounting and discharge proceedings in the two receiverships, they must have had in contemplation the payment of attorney's fees. If there was no existent obligation on the part of the receivers to this plaintiff at the moment when the promise was made, there was an agreement on their part to assume such an obligation to this plaintiff or some other attorney. Certainly the receivers had when the promise was made, and have now a very direct interest that the defendants shall fulfill their promise to the plaintiff, because in reliance upon their promise to do so they conveyed to the defendants all the assets of the company which they held, and if the promise be not fulfilled they will themselves remain liable to compensate the plaintiff. The fact that the particular person who was to benefit from the promise was not known when the promise was made is not material. It was known that an obligation must be incurred to some attorney, if not to this plaintiff, certainly to some other. Cases are not lacking in which the rule invoked by the plaintiff has been applied, even though the obligation had not been incurred, and the identity of the beneficiary was unknown when the promise was made. Riordan v. First Presbyterian Church, 6 Misc. Rep. 84; Coster v. Mayor, 43 N. Y. 399. In the latter case it was said: "Nor is it an anomaly, that the liability which the city assumes, is not in existence at the date of its obligation, nor that the person who was to be benefited by it is not then known. * * * In Dutton v. Poole, 3 Bos. & Pull. 149, note a, and in Schermerhorn v. Vanderheyden, 1 Johns. 139, the promisee was, at the time of making the promise, under no legal liability to the person for whose benefit the promise was made." It is true, as urged by the defendants, that the contract between the State and the city

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of Albany, which was the subject of discussion in Coster v. Mayor, was entered into pursuant to an act of the Legislature, but the plaintiff's right to recover rested not upon the terms of the statute, but upon the contract made under its sanction. In Embler v. Hartford Steam Boiler Ins. Co., 158 N. Y. 431, there are some expressions used by the learned judge writing the opinion, which, taken by themselves and read without regard to the particular facts of the case, seem to make against the plaintiff's contention. The facts, however, were quite dissimilar from those with which we are now called upon to deal, and a majority of the court expressly placed their concurrence in the result upon a ground not involving any question applicable to the present case. The defendants' agreement was to pay the expenses of the accounting proceedings "as and when the same may be ascertained." This must be held to mean as ascertained according to law. That is, as ascertained by the action of the court in fixing the attorney's compensation, as it is only by such action that such compensation can legally be fixed. The answer raised no issue as to the value of the plaintiff's services, and testimony upon that subject was properly excluded.

The judgment must be affirmed, with costs.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Ellen Laracy Finlay, as Surviving Partner, etc., Respondent, v. Millie Heyward, Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Principal and agent — A collecting attorney cannot accept the debtor's note — Ratification by acquiescence.

In the absence of specific authority an attorney to whom a claim has been transmitted by a creditor for collection has no authority to accept a promissory note of the debtor, or that of a third person, in payment of the claim.

Five years' acquiescence of the creditor is sufficient, however, to permit the inference of ratification by the creditor of the unauthorized act of her attorney.

Finlay v. Heyward, 34 Misc. Rep. 818, reversed.

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APPEAL from a judgment of the General Term of the City Court of the city of New York, and an order affirming a judgment entered upon the verdict of a jury at Trial Term in favor of the plaintiff.

Albert B. Kerr (Arthur J. Baldwin, of counsel), for appellant.

Robert Davidson (Isaac L. Miller, of counsel), for respondent.

Per Curiam. In 1893 the defendant, then an unmarried woman, became indebted to the firm of which plaintiff is surviving partner. The defendant then lived in a western city. The plaintiff's firm placed the account in the hands of their lawyer for collection, and he forwarded it to a lawyer living in the city in which the defendant resided. After some negotiations, one of the defendant's brothers paid the western lawyer a small amount of cash on account of the claim, and for the balance gave his own note, indorsed by another of the defendant's brothers, for which a receipt was given by the lawyer with whom the settlement was effected. The cash and note were transmitted to the plaintiff's New York lawyer, who at once sent both to plaintiff's firm. No effort was ever made to collect the note, and all of the questions put by defendant's counsel with a view to showing that the maker and indorser of the note were solvent when it was made, and for sometime thereafter, but have since become insolvent, were excluded by the court. It is undoubtedly true that, in the absence of specific authority, a lawyer to whom a claim is intrusted for collection has no right to accept a promissory note either of the debtor, or of a third person, in payment of the claim. There is no evidence of any such specific authority either to the New York or western lawyer, and the act of the latter in accepting the note of the defendant's brothers was not binding upon the plaintiff's firm, unless they subsequently ratified his action. It is not necessary that such ratification be express, but it may be inferred from long-continued acquiescence. In the present case the plaintiff has retained the note for some five years, without either repudiating the unauthorized act of her agent, or making any attempt to collect the note. It may be, as defendant attempted to prove, that the makers of the note were solvent for some time

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after it was made, and that if plaintiff had within a reasonable time either returned the note or refused to accept it in payment or attempted to collect it the defendant might have taken steps to protect herself. If the note was given in payment of the claim the plaintiff by her long acquiescence in its acceptance by her agent, must be deemed to have ratified his acceptance of payment by the note of a third person. Even if the note was accepted merely as collateral security for the debt the plaintiff has been guilty of laches in taking no steps towards collecting it. In the one case the debt has been paid; in the other, the defendant should be permitted to show that she has suffered damage by reason of plaintiff's laches. In either case the judgment must be reversed and a new trial granted, with costs to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

PERIC MARGOLIES, Respondent, *v.* MAX ERNST, Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Pleading — Denial.

Where an answer, interposed to an action brought for the breach of an oral contract to employ the plaintiff at a fixed compensation and for a fixed term, denies each and every allegation of the complaint except that the defendant employed the plaintiff, the period of employment is a material issue; and it is therefore erroneous for the court to charge the jury, at the request of the plaintiff, that "There has been no denial of the contract on the pleadings".

Margolies v. Ernst, 34 Misc. Rep. 832, reversed.

APPEAL from an affirmance by the General Term of the City Court of the city of New York of a judgment rendered in favor of the plaintiff at a Trial Term of said court. The first paragraph of the amended complaint in this action was as follows: "I. That on or about the 18th day of August, 1899, the above named plaintiff and the defendant herein, entered into an agreement, wherein and whereby, the said defendant, in consideration of this plaintiff

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entering into his employ and service, for the term and at the compensation hereinafter stated, agreed to employ and did employ the above named plaintiff, as a foreman in the said defendant's pants factory, at No. 535 Broadway, in the city of New York, borough of Manhattan, for a term of one year, beginning from the above named date, at a salary of ten hundred and forty ($1040) dollars a year, payable in equal weekly payments of twenty ($20) dollars per week during said term, and said plaintiff, in consideration thereof, agreed to and did enter into the employ of the said defendant, for said term at said compensation as hereinbefore stated, and thereupon entered upon his service, and continued in said employment and service, until the 8th day of October, 1899." The second paragraph alleged a wrongful discharge. The first paragraph of the answer was as follows: "I. Defendant admits that the above named plaintiff was employed in his factory at No. 535 Broadway, in the city of New York, borough of Manhattan, until the 8th day of October, 1899, but denies each and every allegation or parts of allegations contained in paragraph marked 'I' of the first cause of action in plaintiff's amended complaint contained."

Horwitz & Samuels (S. Livingston Samuels, of counsel), for appellant.

M. Feltenstein, for respondent.

Per Curiam. This action having been brought upon an oral contract of employment at a fixed compensation and for a fixed period, and all of the averments in the complaint having been denied in the answer except that the plaintiff was employed in defendant's factory, the period of employment was certainly one of the material issues involved in the trial. In the main charge of the learned court no reference is made to this subject, but at plaintiff's request the court charged in the following words: "There has been no denial of the contract on the pleadings." This was manifestly error, and left to the jury only the question as to whether or not the affirmative defenses pleaded in the answer were established. It amounted to a statement by the court that the contract, as set forth in the complaint, was admitted, and, indeed, in view of some of the rulings upon evidence, there is good

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ground for the contention that this was the general theory of the case adopted by the learned trial court.

Judgment reversed and new trial ordered, with costs to appellant to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

THE MUTUAL LOAN ASSOCIATION, Respondent, v. FRED BRANDT, Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Bills and notes — Consideration — Rebuttal of presumption arising from an exchange of notes.

Where the holder of a promissory note proves by the maker (who alleges that he received no consideration for it and that the holder cannot enforce it because the holder bought it at an usurious discount) that, on the day he delivered the note to the assignor of the holder, the maker received from the assignor his note of the same amount and maturity, the maker is entitled to show in rebuttal what occurred when the assignor gave him his note, as the maker is entitled to rebut the presumption of exchange which arises from the similarity in the date and tenor of the notes.

Mutual Loan Assn. v. Brandt, 34 Misc. Rep. 400, reversed.

APPEAL from a judgment of the General Term of the City Court of the city of New York, affirming a judgment entered on a verdict directed by the court at Trial Term.

Action upon a promissory note made by the defendant to his own order, indorsed by him, by Estella Heymann, and by Henry M. Heymann, and delivered by the latter to the plaintiff at a discount greater than the legal rate. The plaintiff proved by the defendant, on the latter's cross-examination, that on the same day that he delivered the note in suit to Henry M. Heymann he received from Heymann his note for an equal amount, maturing at the same date. The defendant had testified on the direct that he had received no consideration for the note in suit,

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and that it was made by him for the accommodation of Henry M. Heymann. The court refused to let the defendant show, on the redirect, "just what occurred" when Henry M. Heymann gave the note in suit, and also excluded the defendant's attempt to prove, by the books of the plaintiff, usury in the purchase of the note.

Mayer & Gilbert (A. S. Gilbert and Julius M. Mayer, of counsel), for appellant.

Jacob Levy (S. D. Lasky, associated), for respondent.

Per Curiam. It seems to be conceded that if the note in suit was given in exchange for a similar note by Heymann, plaintiff's assignor, the defense of usury must fail. If, however, it was given without consideration and had no legal inception until discounted by plaintiff, the defense may be successful. The crucial question, therefore, is whether or not there was an exchange of notes. The correspondence, in date, amount and term of the note given to Heymann by Brandt, and the note given by Brandt to Heymann, certainly raises a presumption that there was such an exchange, but it is a presumption which might be capable of refutation, and the defendant had the right to rebut it if he could. The question put to him as to what occurred when Heymann gave him the note which is asserted to have been given in exchange for the note in suit, was, therefore, material and pertinent, as its answer might have tended to rebut the presumption of exchange which rests alone upon the similarity in date and tenor of the two notes. The refusal to permit the question to be answered was error, for which the judgment must be reversed.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial granted, with costs to appellant to abide event.

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THERESE D. BROWNING, Appellant, *v.* AARON GOLDMAN et al., Respondents.

(Supreme Court, Appellate Term, June, 1901.)

Costs — Not affected by withdrawal of juror.

The withdrawal of a juror during the progress of a trial at the request of a party does not affect the right of the successful party to tax a trial fee.

Browning v. Goldman, 34 Misc. Rep. 827, reversed.

APPEAL from an order of the General Term of the City Court of the city of New York, affirming an order denying the plaintiff's motion for a retaxation of costs.

C. E. Thornall, for appellant.

J. A. Seidman, for respondents.

Per Curiam. This case has been tried three times. Upon the first trial a verdict in favor of the plaintiff was rendered, and upon his motion was set aside on the ground of insufficient damages. Upon the second trial a juror was withdrawn at defendants' request to enable them to apply at Special Term for leave to amend the answer. The third trial resulted in a verdict for plaintiff for the full amount. The clerk taxed only two trial fees issues of fact. A motion for a retaxation was denied, and upon appeal to the General Term of the City Court from the order entered upon this decision, the said order was affirmed. This was error. It has been frequently held that the withdrawal of a juror in the progress of a trial did not affect the right of the successful party to the taxation of costs. Gilroy v. Badger, 28 Misc. Rep. 144; Hudson v. Erie R. R. Co., 57 App. Div. 99.

The order appealed from reversed, with costs and disbursements and retaxation ordered.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Order reversed, with costs and retaxation ordered.

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ADELBERT S. NICHOLS, Appellant, *v.* GEORGE POTTS AND CHARLES F. PATRIDGE, Composing the Firm of POTTS & PATRIDGE, Respondents.

(Supreme Court, Appellate Term, June, 1901.)

Conditional sale of mantels — Rights as between vendor and mortgagees of premises in which the mantels were put — Bona fides and notice — L. 1897, ch. 418, §§ 112, 113 — Replevin.

Where a vendor of cabinet mantels, sold upon condition that the title shall not pass until full payment, files the conditional contract of sale in the manner required by law, his reservation of ownership is effectual from the day of filing against all subsequent purchasers, pledgees or mortgagees in good faith.

Where the mantels have been placed in premises of the conditional vendee which he had mortgaged before the conditional sale and delivery, the mortgagees cannot hold the mantels as against the conditional vendor unless they show that they have made advances thereon between the date of the conditional sale and the filing of the conditional contract of sale, and further, that the advances were made in ignorance of the continuing title of the conditional vendor.

Where defendants, in replevin, show no right of property or possession to the chattels in suit, possession should not be awarded them, and the complaint should merely be dismissed.

APPEAL from a judgment in favor of the defendants, rendered in the Municipal Court of the city of New York, ninth district, borough of Manhattan. Action of replevin.

Goeller, Shaffer & Eisler, for appellant.

George S. Billings, for respondents.

Per Curiam. In August, 1899, the plaintiff sold and delivered to one D. T. Atwood certain cabinet mantels under a conditional bill of sale, which provided in terms that the title to and property in the mantels should remain in the plaintiff until they were paid for. Atwood was a nonresident of the State of New York, and

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the bill of sale was duly filed in the office of the register of Kings county on November 17, 1899. Under the provisions of the Lien Law (Laws of 1897, chap. 418, §§ 112, 113), the reservation of ownership in the plaintiff was valid and effectual from the date of filing against all subsequent purchasers, pledgees or mortgagees in good faith. As to any mortgagee whose lien upon the real estate has attached before the conditional sale and delivery of the mantels, no claim could be asserted to the mantels, because, until paid for, they remained personal property and not a part of the realty. Duffus v. Howard Furnace Co., 8 App. Div. 567. It appears that at the time of the sale of the mantels the house in which they were placed was subject to certain mortgages, one of which was afterwards foreclosed by the defendants, to whom it had been assigned, and the property sold to one Bacon, who, as it is claimed, acted merely as a dummy for the defendants. After the conveyance to Bacon, the plaintiff commenced this action for the replevin of the mantels, and they, and all except a small portion of the goods which entered into their construction, were taken and returned to the plaintiff. The defendants denied that any proper demand had been made upon them, or that they owned the mantels or had them in their possession or control, but alleged that they belonged to John Bacon, who is not a party to the action. The justice awarded judgment in favor of the defendants for a return of the property, or, in default thereof, for the payment of a sum which he fixed upon as the value. The evidence does not disclose when Atwood made the mortgage which was foreclosed. It seems to have been assumed upon the trial that it was made before the conditional sale and delivery of the mantels. If this is so, the mantels never fell under the lien of the mortgage, unless advances were made thereon after the delivery of the mantels and before the filing of the contract for sale. The learned justice seems to have based his decision in part upon the assumption that such advances had been made. We are unable to find in the record any satisfactory evidence of the fact. The mortgage seems to have been made to one McLaughlin. It is not attached to the return and we are, therefore, not advised as to its contents. The only evidence touching advances is contained in the testimony of George Potts, one of the defendants, who said that he told the plaintiff's agent, during the progress of the foreclosure suit, and before the filing of the contract of conditional

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sale, that "the inspector had been through the houses several times recently inspecting the houses and he had made payments from the title company on these houses with the mantels being in, which he wouldn't have made if the mantels had not been in the houses." This falls very far short of competent evidence that any advances had been made, or, if they had, that they had been made under McLaughlin's mortgage, for there is nothing in the evidence to connect McLaughlin with the title company, or any advances made by it. If the defendants desired to rest their defense upon the making of advances between the date of sale and the date of filing of the contract, they should have offered some competent evidence to show not only the fact of such advances, but also that they were made in ignorance of the continued title to the mantels in the plaintiff. Duffus v. Howard Furnace Co., *supra*, 573. Nor was the justice authorized in awarding to the defendants possession of the property and damages for its withholding. Unless Bacon was their dummy, which they do not concede, there is nothing in the evidence to show any right of possession in them. Their whole defense is based upon the contention that Bacon, and not themselves, owned the property, and there is no evidence that he has ever conveyed it to them. At the most the judgment should have gone no further than to dismiss the complaint, leaving the question of ownership, as between Bacon and the plaintiff, to be determined in an appropriate action. Nor was there any evidence of the value of the goods which were replevied. They did not include all that were sold, and there is nothing in the case to show the value of that portion which was not returned.

Judgment reversed and new trial ordered, with costs to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed, new trial ordered, with costs to abide event.

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NATHAN SCHEUER et al., Appellants, *v.* MORRIS L. MONASH, Respondent.

(Supreme Court, Appellate Term, June, 1901.)

Services — Statute of Frauds — Abandonment — Damages.

The invalidity of a contract for services by its terms not to be performed within a year is not available to the master to defeat a recovery by the servant of his agreed compensation where he has been permitted to perform and has performed upon his part.

In such case the void contract may afford a measure of the value of the services.

Where however the servant performs services for only ten months of the stipulated term of one year and then abandons without the master's consent, he cannot recover under the contract, nor does his stipulated yearly salary afford a measure of the value of his services for ten months.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, ninth district, borough of Manhattan.

Jay C. Guggenheimer, for appellants.

M. D. Steuer, for respondent.

Per Curiam. The learned justice who tried this case rendered a written opinion, in which he said that, from the evidence given upon the trial and the demeanor and conduct of the witnesses, he concluded that the defendant truthfully stated the agreement which existed between the parties.

Accepting this estimate as to the comparative truthfulness of the parties, it remains to consider whether, upon the defendant's own showing, the judgment should be allowed to stand. The action was for money loaned to the defendant and goods sold to him. He did not dispute the receipt of the money and goods, but set up a counterclaim, upon which the action turned. According to the defendant's story, a verbal agreement was made between the plaintiffs and himself on November 15, 1899, whereby he agreed to act as salesman for them for the year 1900, commencing

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on the first day of January and ending on the thirty-first day of December, and they in return agreed to pay him a certain weekly salary, a stated commission and a bonus of $500, providing his sales reached $20,000. He entered upon the performance of this agreement, and his sales, up to the time he left the plaintiffs' employ, on November 6, 1900, amounted to more than the stipulated sum. The agreement, being one which by its terms was not to be performed within a year, was obnoxious to the Statute of Frauds, but, notwithstanding that fact, if the plaintiffs permitted the defendant to go on under it and perform the services it called for, and if he did, in fact, perform the contract on his part, the plaintiffs cannot avail themselves of the statute to deprive him of his agreed compensation. The contract was one covering the whole year 1900. The plaintiffs were entitled to defendant's services, not only until he had sold $20,000 worth of goods, but until the end of the year. He continued to serve them only until November sixth, when his agreement had nearly two months to run. The justice was of the opinion that the contract had been terminated by mutual consent, and, so concluding, decided that the situation of the parties and the defendant's rights thereunder were the same as they would have been had the contract been fully executed by continuing the services until the end of the year. If he was right in deciding that the contract had been terminated by mutual consent, the conclusion to which he arrived undoubtedly followed. Jeffery v. Walker, 72 Hun, 631. Accepting again the defendant's own version of the matter, we are unable to find any evidence of consent by the plaintiffs to the termination of the contract. It is true that he testifies that when he told one of the plaintiffs that he had a chance to make a good change, the latter said: "If it is a very good one take it, because you would be a fool not to accept it". It does not appear, however, that he told the plaintiff that the change was one to take effect immediately, nor is there anything to indicate that the plaintiff, with whom he was talking, had reason to so understand it. On the contrary, the presumption is all the other way. The defendant, in October, 1900, asked Henry Scheuer what arrangement he would make for next year, meaning, as defendant himself says, the year 1901. The parties seem to have had several conversations about the contract for the following year, and it was in the course of one of them that the defendant spoke of the

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better chance which had offered itself. He does not say that he told either of the plaintiffs that the better chance involved breaking his existing engagement, and, considering the fact that the conversations related solely to a contract for the next year, the natural assumption would be that the better chance to which he referred meant a better chance for the year 1901. We are unable to spell out of this conversation any consent to the premature termination of the existing agreement. If the defendant abandoned his employment before the end of the stipulated term, without the consent of his employers, as from his own evidence we are convinced that he did, he certainly cannot recover upon his contract. Whether or not he could recover upon a *quantum meruit,* for the work done, it is not necessary to discuss, for he neither sought to recover upon that theory, nor was any evidence offered as to the value of his services except the contract itself. Such a contract, even though void under the Statute of Frauds, might furnish a measure of the value of the services, if the defendant had fulfilled the contract on his part. Having refused to fulfill, he cannot rely upon the contract to fix the value of his services. His agreement was to serve for one year, and his compensation, including his bonus, must be deemed to have been fixed with reference to such service. The compensation, having been agreed upon with reference to a year's complete service, was not, therefore, competent evidence of the value of the services during ten months. Galvin v. Prentice, 45 N. Y. 162. There was, therefore, no competent evidence in the case as to the value of the defendant's services, and nothing upon which to base a judgment in his favor.

Judgment reversed, with costs to abide the event.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed, with costs to abide event.

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THOMAS McDONALD, Respondent, v. HENRY ALEXANDER, Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Services — Evidence rebutting terms of alleged contract.

Where an employee sues a contractor for his board and expenses under the latter's alleged agreement that if the servant went away to the place of employment and worked for a few months only the contractor would pay his board and expenses but that if he went for a year he would not pay them as it was a long job, and the employee testifies upon the trial that the contractor asked him to go because he was hard up for men, the contractor is entitled to show under such an unusual contract that there was no dearth of workmen of the employee's class and that he made no claim for board until after he was discharged.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, third district, borough of Manhattan.

Horwitz & Samuels, for appellant.

Thomas H. Smith, for respondent.

Per Curiam. The plaintiff was employed by the defendant, a contractor, to work at Oakdale, Long Island. His claim is for board and traveling expenses. His allegation is that when he was employed he refused to go unless he was paid board and expenses, and that defendant said: "If you go out there for a few months only I will pay your board and expenses, but if you go out for a year or more I will not, because it is a long job and will last over a year, but for a few months I will pay your board and expenses."

The defendant and his superintendent flatly contradict the plaintiff and deny that any agreement whatever was made relative to board. The plaintiff testified that the defendant asked him to go because he was hard up for men. This was pertinent testimony, because it tended to throw some light upon the disputed question

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of fact, and, if true, explained in some degree why the defendant was willing to make such an unusual agreement. The defendant, by proper questions, sought to show that there was at the time no dearth of competent workmen of the plaintiff's class. This evidence was excluded, and in this, error was committed. If there had been plenty of men available, the supposed reason for making the agreement vanished, and the probability that it was ever made was greatly lessened. One Tripp, who was the defendant's foreman on the job, who paid the plaintiff his wages and discharged him, was asked when he first heard that the plaintiff made a claim for board. He should have been allowed to answer, because, if plaintiff had accepted his dismissal and his wages up to that time, and had made no claim for board until long afterwards, that circumstance would have had a strong bearing upon the probability of his story. If he, by reason of his discharge before the end of the year, became entitled to his board and traveling expenses, it would have been most natural that he should have said something about it or made some demand at the time of his discharge. The alleged contract was emphatically denied and was an unusual one for an employer to make, since it offered a premium to the workman not to stay out the full year, and, hence, everything tending to establish its probability or improbability was pertinent.

Judgment reversed and new trial granted, with costs to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

FREDERICK G. SCHILLINGER, Respondent, *v.* HENRY HERRMANN, Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Municipal Court of the city of New York — Jurisdiction of non-resident — How challenged.

Where a defendant proposes to challenge the jurisdiction of a court he should appear specially and raise the question by motion and therefore an answer which begins by stating that the defendant an-

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swers "without conceding jurisdiction of this court" is insufficient to raise the question.

A non-resident of the city of New York may be sued in its Municipal Court by a long summons if he has a place in the city for the regular transaction of business, and, therefore, where he is so sued within the city, he cannot overcome the presumption that the service was proper and oust the court of jurisdiction unless he shows not only that he was a non-resident but also that he had no place in the city for the regular transaction of business.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, seventh district, borough of Manhattan.

Goepel & Wahle, for appellant.

Franklin Pierce, for respondent.

Per Curiam. This action was commenced in the Municipal Court of the city of New York by the service of the usual or "long" summons. The complaint was verified and the defendant served a verified answer, in which he set up as a first defense a general denial, as a second defense that he was a nonresident of the city of New York, and as a third defense that there had been a former litigation between the parties. The answer was subscribed by his attorneys in the customary form, without reservation, except that at the beginning of the answer it is stated that the defendant answers "without conceding the jurisdiction of this court." It has recently been decided that an action in a Municipal Court against a nonresident defendant must be commenced by the service of the "short" summons provided for by section 1298 of the Greater New York charter (Laws of 1897, chap. 378). But it has also been held that subdivision 3 of section 1370 of the same charter, which provides that "No person who shall have a place in said city for the regular transaction of business shall be deemed a non-resident under the provisions of this title", creates an exception to section 1298, in that it authorizes the commencement of an action against a nonresident who has a regular place of business within the city of New York, by the usual "long" summons such as was issued in the present action. Routenberg

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v. Schweitzer, 164 N. Y. 566. When such an action is commenced by a "long" summons formally served upon the defendant within the said city, the residence of the defendant and the consequent jurisdiction of the court will be presumed without allegations or proof of residence. Sperry v. Major, 1 E. D. Smith, 361. So, when a defendant objects that he should have been served by a short, instead of a long, summons, he must show the necessary facts to overcome the presumption that, in his case, the long summons was the proper process. In other words, he must show both that he is a nonresident and that he has no place within the said city for the regular transaction of business, for, if he be either a resident or have such a place of business, he can be sued by a long summons. The defendant's plea of nonjurisdiction was defective, in that, while he alleged his nonresidence, he failed to allege that he had no place of business within the said city. Even if the defendant could not lawfully be sued by a "short" summons, he did not take the objection properly or in due season. If the service was void by reason of the defendant's nonresidence, it was as if he had never been served at all. Still, since the action was one which the Municipal Court had jurisdiction to entertain, if properly begun, the defendant could waive any defect in the process, and submit himself to the jurisdiction. If he had not intended to submit himself to the jurisdiction of the court, he should have appeared specially for the purpose of raising the question of jurisdiction by motion, for, where the case is one in which the court can acquire jurisdiction by the proper service of a summons, the fact of nonservice or of defective service cannot be raised by answer. Reed v. Chilson, 142 N. Y. 152; Goldstein v. Goldsmith, 28 Misc. Rep. 569. So far as concerns the merits, there was a sharp conflict of testimony upon which the justice decided, as he had a right to do, in favor of the plaintiff. The nonproduction of the note by the plaintiff was sufficiently accounted for.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

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STEPHEN H. TYNG et al., Appellants, *v.* FREDERICK A. CONSTABLE et al., Respondents.

(Supreme Court, Appellate Term, June, 1901.)

Principal and agent — Real estate brokers' commissions.

Where brokers employed to lease real estate fail to make the minds of the owners and that of the proposed tenant meet upon the question of rental, and a third party subsequently succeeds in persuading the owners to lower the rent and lease the premises to the proposed tenant, the brokers are entitled to no commissions from the owners as they have not been the procuring cause of making the lease.

APPEAL from a judgment rendered in favor of the defendants in the Municipal Court of the city of New York, seventh district, borough of Manhattan.

Stedman & Larkin, for appellants.

Oppenheim & Severance, for respondents.

Per Curiam. Action for brokers' commissions in leasing real estate. It was stipulated upon the trial that the plaintiffs were employed as brokers to procure a tenant for the premises. It appeared that they did procure a person who was willing to make a lease. The negotiations were conducted in writing and consisted of various propositions and counter-propositions, culminating in two letters, dated, respectively, July twenty-seventh and July twenty-eighth. In the first, the plaintiffs said to defendants: "We have advised our client of your refusal of his offer, as per our letter of the 25th instant. He now instructs us before dropping the matter to make you a final offer for the lease as follows:" Then follow the proposed terms, and the letter concludes thus: "We would ask you to let us know at once if you accept offer." To this the defendants at once replied that the best they could say for the premises was a certain rental, in excess of that offered by the plaintiffs. The negotiations between the

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plaintiffs and the defendants stopped here, and, so far as appears, they had no further communication touching the proposed leasing of the property. It is obvious that up to this point they had not entitled themselves to a commission, and, from the positive terms in which their last letter to defendants was couched, the latter were fully justified in believing that the negotiation was at an end. The proposed tenant was abroad when these letters were written. About a month afterwards he returned, and one of the plaintiffs went with him to see the premises in question, showed him the defendants' letter of July twenty-eighth, and told him that it would be of no use to submit any further proposition at a less figure than that named by the defendants. The plaintiffs seem to have taken no further steps looking to effecting a lease of these premises, but began negotiations for other premises for their client. Shortly after another broker approached the prospective tenant and effected a lease to him at a less figure than that which the defendants had fixed in July, as the least they would accept. There is nothing in the evidence to show that the efforts of the plaintiffs to make the lease were in any sense a procuring cause of the lease that was actually made. All that can be said is that the defendants changed their minds between July twenty-eighth and September fifteenth as to the rent they would demand for the property. This they had an absolute right to do. The result is unfortunate for the plaintiffs, but it is owing to their own lack of persistency. It is probable that if they had reopened negotiations after the tenant returned, in September, they might have been able to effect a lease, but by this time they had abandoned the effort. They never succeeded in bringing the minds of the parties together, and, therefore, never earned a commission.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

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THE RAILWAY ADVERTISING CO., Appellant, *v.* CHARLES H. POSNER et al., Respondents.

(Supreme Court, Appellate Term, June, 1901.)

Contract — Construction — Time.

The plaintiff contracted to insert the defendants' advertising card in certain street cars for a term of twelve months commencing December 1st, 1899, and the right was also reserved to the defendants to discontinue the contract at the end of three months by giving the plaintiff thirty days previous written notice and paying twenty-five dollars per month additional.

Held, that the last day for giving notice of discontinuance was Jan. 30, 1900.

That, in the absence of any proof thereof, it was erroneous for the court to submit to the jury the question whether the time for giving notice had been extended by consent or acquiescence.

APPEAL from a judgment rendered in favor of the defendants in the Municipal Court of the city of New York, sixth district, borough of Manhattan.

Einstein & Townsend, for appellant.

Cornelius F. Collins, for respondents.

Per Curiam. This case turns upon a written contract between the parties, which is so plain as to scarcely require construction. The contract, which was dated November 26, 1899, authorizes the plaintiff to insert the defendants' advertising card in certain street surface cars "for a term of twelve months commencing December 1st 1899." The contract contained the following clause: "Posner Bros. reserve the right to discontinue this contract at the end of three months by giving the Railway Advertising Company 30 days previous written notice and paying $25 per month additional." The contract thus, by its terms, began to run on December 1, 1899, and was to continue for one year unless terminated in the manner therein prescribed. It could be discontinued only at the end of three months from the commencement of the term,

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or on March 1, 1900, and then only by giving the plaintiff thirty days' previous written notice. Thirty days prior to March 1, 1900, would have been January thirtieth. No such notice was given. On January thirty-first the defendants wrote to the plaintiff requesting it to take their cards from the cars, and to keep them out for one month. On February 1, 1900, defendants wrote to the plaintiff, "We again notify you to discontinue our contract for advertisement in cars ending March 5th". Neither of these notices were effectual to end the contract, because neither was given thirty days before the expiration of three months after the commencement of the term. The letter of January thirty-first did not purport to be a cancellation of the contract, but merely a notice to keep the cards out for one month. The letter of February first, in addition to being too late, did not undertake to terminate the contract on March first three months after the expiration of the term, but on a later date. The justice, under exception by plaintiff's counsel, submitted to the jury the question whether, by consent or acquiescence of the parties, the time for the commencement of the contract had been extended to December 5, 1899. There was no competent evidence to justify such a contention on the part of the defendants, and the submission of the question was error. The contract itself provided as follows: "Cards to be furnished by advertiser, and in case of delay of copy or cards it shall be at the advertiser's loss." The cards were not furnished until December fifth, but there was no evidence that the plaintiff would not have been able to place them in the cars if they had been received by December first. The defendant testified that when he made the contract he said to one of the plaintiff's officers, "how about printing?"— to which the officer replied, "I will send you a printer." It appeared that the officer in question telephoned a printer to call on Mr. Posner, and that he did so at once and received an order to print the cards. It was owing to delay in the printing of the cards that they were not ready to be inserted in the cars until December sixth. There is certainly nothing in this testimony to charge the plaintiff with the printer's fault, if he was in fault, in not having the cards printed in time. The plaintiff did not stipulate that it should select the printer, or even advise the defendants to employ any particular printer, but more as a friendly act, at defendants' suggestion, sent a printer with whom the defendants might or might not make a contract.

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There was nothing to justify leaving the question of the extension of the contract to the jury, and, for the error in so doing, the judgment must be reversed and a new trial granted, with costs to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

JAMES BROWN, Respondent, *v.* JACOB HOROWITZ, Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Breach of warranty — Running away of a horse "kind and sound in all harness."

An action for a breach of a warranty that a horse is "kind and sound in all harness" is not sufficiently supported by proof that, after he had been driven safely for several hours before a hansom cab, he ran away for some unexplained reason, it appearing that the cab was not adapted to the conformation of his body, that he had previously been gentle, and that the driver was not called as a witness upon the trial nor his absence accounted for.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, eighth district, borough of Manhattan.

Leroy D. Ball, Jr., for appellant.

Lyman A. Spalding, for respondent.

Per Curiam. This is an action for damages for breach of warranty upon the sale of a horse. The warranty was "Warranted kind and sound in all harness and good wind." On the evening of the sale plaintiff, who is a liveryman, hitched the horse to a hansom cab and, after driving him a little, turned him over to one of his drivers. This was about half past six. The driver made three calls with the horse, and about one o'clock in the morning he and the plaintiff, who was driving another cab, went to supper to-

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gether. After supper they started for the plaintiff's stable on West Thirty-ninth street, New York city. The plaintiff, on his cab, was behind the cab to which was hitched the warranted horse. When they were between Eighth and Ninth avenues, the warranted horse began to run. The plaintiff whipped up his horse and managed to pass and get in front of the runaway so as to stop it. The cab was somewhat injured. The plaintiff returned the horse to the auctioneer and was tendered back the sum he had paid, but refused to accept it saying that he proposed to collect further damages. There is nothing in the evidence to show what caused the runaway. It appears that there was a passenger in the cab at the time, but neither he nor the driver was called as witnesses, nor was any attempt made to explain or account for their absence. Former owners of the horse were called, who testified that the horse was kind and had never been known to run away. It was further testified to by persons expert in such matters that the horse was unusually tall and long in the body, and that a horse of such conformation was not well adapted for use in the ordinary hansom cab unless exceptionally long shafts were used. The warranty in the present case was not a specific warranty that the horse was suitable to be driven before a hansom cab, but merely that he was kind and sound in all harness. We do not think that the evidence justified a finding that the warranty had been broken. All that appeared was, that, after the horse had been safely driven for several hours, he ran away. Absolutely no evidence is offered to show how he came to run, and neither the driver, nor the passenger, who may be supposed to know something of the circumstances, has been called upon to state them. It is a fair inference from the failure to call or account for the absence of the driver that his testimony, if produced, would not have added anything to the strength of the plaintiff's case. Milliman v. Rochester R. Co., 3 App. Div. 109; Cushman v. De Mallie, 46 id. 379. We have, therefore, as the sole evidence of a breach of warranty, the unexplained fact that the horse ran away. This in our opinion was not sufficient in the face of the positive evidence of the horse's previous gentleness, and of the necessity, owing to his visible conformation, to especial care in hitching him to the particular vehicle in which it was attempted to use him. The horse having been re-delivered to and accepted by the seller, the plaintiff is entitled to recover the purchase price. The judgment will be affirmed, with-

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out costs, if the plaintiff stipulates to reduce it to the sum of thirty-three dollars and thirty-seven cents and that ten dollars of the costs already paid to plaintiff shall be applied to the payment of said judgment, otherwise the judgment will be reversed and a new trial granted, with costs to the appellant to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, without costs, if plaintiff stipulates to reduce it to the sum of $33.37, otherwise judgment reversed and new trial granted, with costs to appellant to abide event.

PHILIP STROMBERG et al., Respondents, *v.* BASILIO CARNESE, Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Municipal Court of the city of New York — Irregular amendment of summons changing the defendant's name — "Agent" of defendant — L. 1882, ch. 410, § 1294.

Where a summons of the Municipal Court of the city of New York is not in the proper name of the defendant and contains no statement that the name by which he is designated is fictitious, and he does not appear on the return day either in person or by an agent or by an attorney, the court has no power then to amend the summons to the proper name of the defendant and render judgment against him by that name.

The presence of the defendant's wife in the Municipal Court on the return day, in order to explain her husband's absence, does not make her his "agent" within the Consolidation Act (L. 1882, ch. 410, § 1294).

APPEAL from a judgment rendered in favor of the plaintiffs in the Municipal Court of the city of New York, second district, borough of Manhattan. Action for conversion.

Goepel & Wahle, for appellant.

E. Rosenthal, for respondents.

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Per Curiam. The plaintiffs sold the defendant a chain and locket for which the plaintiffs testified the defendant agreed to pay the sum of thirty-eight dollars and fifty cents; that of this amount twenty-one dollars and fifty cents was actually paid, and a balance of seventeen dollars remained due. Plaintiffs offered in evidence what purported to be a conditional contract of sale, but an inspection of this paper establishes the fact that it does not bear the defendant's signature. It appears that, upon the claim of such breach of the conditions of this agreement, the plaintiffs demanded a return of the property, and the defendant refused to surrender it. The summons issued was not in the proper name of the defendant, nor was it stated that the name was a fictitious one. The defendant did not appear personally or by attorney, the only claim of appearance is that defendant's wife was present, and that under the provisions of section 1294 of the Consolidation Act (Laws 1882, chap. 410), she might be regarded as his agent. The examination of this woman who appears to be an illiterate Italian, unfamiliar with the English language, leaves it in grave doubt as to whether she came to defend the action, or to ask for an adjournment. The defendant was entitled to one adjournment for at least eight days. Consolidation Act, § 1364. The complaint was for conversion, and under the judgment an execution against the defendant's body was issued. The amount of the judgment was paid to the marshal under protest and to avoid arrest and detention. An application was subsequently made to open what it was contended was defendant's default, and several affidavits were submitted in this proceeding. From them it appears that the defendant was suffering from gastric catarrh and physically incapable of leaving his house on the day of the trial; these affidavits are not contradicted, nor is the story of the defendant's illness in any way impeached except by what the plaintiffs contend are some contradictory statements of his wife, but, in view of her examination, the lack of familiarity of the court interpreter with her peculiar dialect and her claim of inability to fully understand him, these apparent discrepancies should not be given very much weight. The learned justice below denied the motion to open the default. Under all of these circumstances it is reasonable to presume that the presence of defendant's wife was merely for the purpose of explaining her husband's absence, and to request an adjournment on that account, and it would follow, therefore,

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that the amendment of the summons was irregular. Chadwick v. Navel, 33 Misc. Rep. 683; Stuyvesant v. Weil, 41 App. Div. 551.

Judgment reversed and new trial ordered, with costs to abide event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

HERMAN PECKNER, Respondent, *v.* WILLIAM SEWARD WEBB, as President of the Wagner Palace Car Co., Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Abatement of action against joint stock association of more than seven persons — Code C. P. § 1919 — Remedy of creditor.

The action against the president or treasurer of a joint stock association consisting of more than seven persons, authorized by Code C. P., § 1919, is in effect an action against the association and where it has gone out of existence the action cannot be maintained against the officer.

The defendant may properly take the objection by answer.

The remedy of the plaintiff is against the individual associates.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, seventh district, borough of Manhattan.

Saunders, Webb & Worcester, for appellant.

Louis J. Frey, for respondent.

Per Curiam. The complaint alleges that, at the time of the loss for which plaintiff sues, the Wagner Palace Car Company was a joint-stock association consisting of more than seven persons, and that the defendant Webb was the president thereof. The defendant is sued, under section 1919 of the Code of Civil Procedure, which provides that an action may be maintained against the president or treasurer of such an association, to recover

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any property, or upon any cause of action for or upon which the plaintiff may maintain such an action, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. It was admitted upon the trial that until December 31, 1899, the defendant Webb was, and had been for several years prior to that time, the president of the Wagner Palace Car Company, a joint-stock association, and that before the commencement of this action the joint association of the Wagner Palace Car Company was no longer in existence. The answer had denied the existence of the Palace Car Company, and the defendant's presidency thereof. It has repeatedly been held that an action of this character is in effect an action against the association, and not against the individual named as president and treasurer. Such an action is effective only to the extent that a judgment therein may be collected out of the property of the association, if any such there be. A judgment so obtained is neither a bar to an action against the individual associates, nor is it conclusive of the plaintiff's right to recover in an action against such associates. If, as was conceded upon the trial, there is no such association in existence, it can have no assets, and there can be no president. The action is not, therefore, one which is authorized by the section of the Code above cited, nor could a judgment herein be of any avail. The objection was properly taken by answer because the existence of the association, and the presidency of the defendant were facts which it was necessary for the plaintiff to allege and prove as part of his cause of action, and consequently were issuable. Although the plaintiff may not recover in this action, he is not remediless if he has a meritorious cause of action, because he may still sue the individual associates, as he would be obliged to do in any case, even if this judgment were affirmed.

Judgment reversed and new trial ordered, with costs to abide the event.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

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LOUISE T. RUSSELL, Respondent, *v.* THE METROPOLITAN STREET RAILWAY CO., Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Negligence — Allegations permitting proof of earnings of injured person.

Where the complaint, in an action to recover damages for injuries received in boarding a street car, alleges that the plaintiff "was prevented from attending to her duties as a manufactory employee", she is entitled thereunder to testify upon the trial how much she earned as wages as a basis for the recovery of her loss of wages.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, seventh district, borough of Manhattan.

H. A. Robinson (G. Glenn Worden, of counsel), for appellant.

Hill, Sturcke & Andrews, for respondent.

Per Curiam. There was a sharp conflict of evidence as to how the accident to the plaintiff happened. She and her sister both swear that the plaintiff had started to board the car, which was an open one, and had gotten on to the running board or step with both feet, holding the stanchion with one hand, before the car began to move. If this be so, the conductor should have given her time to reach a place of safety before starting the car. It is true that the plaintiff's story is supported only by herself and her sister, while the defendant's theory that she attempted to board the car after it had started is supported by two apparently disinterested passengers, in addition to the conductor. The witnesses for the defense are not altogether agreed as to the details of the occurrence, while the plaintiff and her sister tell consistent stories and are not in the least shaken on cross-examination. We see no reason to reverse the justice's determination on the facts. The plaintiff was allowed to testify how much she earned as wages. The defendant objected on the ground that she had not

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sued for loss of wages. Her complaint alleges that she "was prevented from attending to her duties as a manufactory employee." We think that this was equivalent to an allegation that she suffered a loss of wages.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

DAVID ALLEN CENTER, Appellant, *v.* MYRON C. RUSH, Respondent.

(Supreme Court, Appellate Term, June, 1901.)

Contract — When entire — Agency.

Where a father permits his son to contract for a year's tuition, the father is liable to the instructor for the whole fee in case the son leaves the school of his own motion before the end of the year.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, seventh district, borough of Manhattan.

B. W. B. Brown, for appellant.

James W. Ridgway, for respondent.

Per Curiam. The plaintiff is the proprietor of a boy's school in the city of New York, in which the defendant's son entered as a pupil at the opening of the school year in the autumn of 1900. The son remained in the school only until some time in January, when he left of his own accord. The defendant paid half the annual tuition fee, but refused to pay the balance for which this action is brought. The negotiations looking to the son's entrance into the school were conducted by the son himself. The defendant testified that he permitted his son to enter the school. The contract was, therefore, made with his knowledge and assent. He took no pains to inform himself as to the terms of tuition, but apparently left the whole matter to his son's management. He thus made his son his agent to contract with the plaintiff, and is bound by whatever contract was made in pursuance of this agency.

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The first letter written by the son, in opening negotiations for entering the school, acknowledges the receipt of a catalogue, and discusses some of its features. A copy of the catalogue shows that it contains the following statement relative to tuition fees. "No reduction is made for students who leave before the end of the school year." This is appended to a clause headed "Tuition fees (per year,)" and that it must have fallen under the eye of the defendant's son is shown by the fact that in one of his letters he discusses the amount of fees charged. The agreement thus was an entire one for a school year, and since the lad withdrew of his own volition, without any act on the part of the plaintiff, the latter was entitled to the fees for the whole year. The second cause of action which was for books furnished was not disputed, and justice must have granted judgment absolute for the defendant by inadvertence.

Judgment reversed and new trial granted, with costs to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

ELIAS MALAWISTA, Appellant, *v.* DOMINICK MALZONI, Respondent.

(Supreme Court, Appellate Term, June, 1901.)

Amendment — Refused, after judgment, when changing the nature of the action.

Where the conditional vendor of a chattel recovers a money judgment against the vendee upon his default, in an action for goods sold, the vendor cannot thereafter procure the justice to amend his return so that it shall appear that the complaint was for conversion, nor will the vendor be permitted to appeal from the judgment in his favor in order that it may be amended so as to state that the defendant is subject to arrest and imprisonment.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, fourth district, borough of Manhattan.

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Eisman & Levy, for appellant.

No appearance for respondent.

Per Curiam. The plaintiff, in June, 1900, sued the defendant in the Municipal Court of the city of New York for goods sold and delivered, seeking thereby to recover the last installments due upon a watch sold under a conditional contract of sale. The defendant defaulted and the case was tried on September 21, 1900, the justice rendering a simple money judgment. On May 29, 1901, the justice and the attorneys for the plaintiff signed a stipulation that the return should be amended so as to read that plaintiff complained of defendant in "conversion," and that the words "goods sold and delivered" in said return be stricken out. This was long subsequent to the appeal which was taken on October 1, 1900. The appeal by the plaintiff is taken in order to procure an amendment of the judgment so that it shall state that the defendant is subject to arrest and imprisonment. The appeal cannot prevail. The plaintiff might doubtless have originally sued in conversion, but he elected to sue, as he had a right to do, for goods sold and delivered, and the judgment rendered followed precisely the complaint. It is too late after a cause has gone to judgment, without notice to the defendant, by a consent signed merely by the plaintiff's attorneys and the justice, to amend the complaint, and upon such an amendment base an appeal for the amendment of the judgment.

The judgment must be affirmed, with costs.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

ANTHONY HUHNA, Respondent, *v.* CORNELL A. THELLER, Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Funeral expenses — Primarily a charge against the decedent's estate — Evidence of estate.

Funeral expenses are primarily a charge against the estate of the deceased and where he leaves one resort should first be had to it.

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Where, therefore, an undertaker sues a defendant upon his alleged contract liability for the charges of the funeral of one to whom he had borne the relation of an adopted son, the defendant is entitled to show that the deceased left an estate and it is fatal error to exclude the evidence.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, third district, borough of Manhattan.

Lansing & Roake, for appellant.

George Malraison, for respondent.

Per Curiam. This is an action by an undertaker to recover the charges connected with the funeral of one Arnold Theller to whom the defendant bore the relation of an adopted son. It appears that the defendant called at plaintiff's place of business and notified plaintiff's employee to go up to the house in which the deceased had died. On the next day defendant gave plaintiff instructions as to what sort of a funeral he wished to have. Arnold Theller, the deceased, was not living with the defendant, but with friends named Hahn. On the trial the defendant made repeated offers to show that Arnold Theller, the deceased, had left an estate. All those offers were rejected and in this we think error was committed. Funeral charges are primarily a charge against the estate of a deceased person, and where such an estate is left resort should first be had to it. Patterson v. Patterson, 59 N. Y. 574. It was, therefore, pertinent to show that the deceased had left an estate out of which recovery could be had. It was claimed, on the part of the defendant, that he engaged the undertaker at the request of and as the representative or agent of the Hahns, in whose house the decedent had died. To sustain this defense defendant was asked as to any conversation with either of them before he went to engage the undertaker. This evidence was excluded. Near the close of the trial the justice himself called Mrs. Hahn to the witness stand and questioned her about the very conversation concerning which he had refused to permit the defendant to testify. It may be that the defendant made himself personally liable to plaintiff in the event that the deceased left

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no estate, or that for any reason the bill could not have been collected out of the estate. The plaintiff should, however, have first resorted to the estate, if there was any, and have shown why he had not collected from that source.

Judgment reversed and new trial ordered, with costs to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

BERNHARD H. LAGE, Respondent, *v.* RACHEL WEINSTEIN and JACOB WEINSTEIN, Appellants.

(Supreme Court, Appellate Term, June, 1901.)

Principal and agent — Election, where both are liable.

Where both the principal and the agent are liable to the creditor they should not be sued jointly; the creditor should elect which one he will hold and a judgment against either, though unsatisfied, will discharge the remedy against the other.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, sixth district, borough of Manhattan.

Kantrowitz & Esberg, for appellants.

David W. Rockmore, for respondent.

Per Curiam. This action was for goods sold and delivered; the defense interposed was a general denial and counterclaim. The plaintiff's claim was that he sold and delivered 2268 square feet of tiling in pursuance of an agreement made and entered into between himself and the defendant Jacob Weinstein. This agreement is attached to the return and is in the following words:

"JACOB WEINSTEIN,
"235 East Thirteenth Street, City.

"DEAR SIR: You will confer a favor upon me by giving to Mr. Lage your acceptance of your guarantee for payment of tiles

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which will be delivered to your job at 235 East Thirteenth Street, you agree to pay 25 cents per square foot as work progresses. You will please pay 20c. to Mr. Lage (for tiles) and 5c. to me on account, the amount of contract to be paid on completion of the work. Very truly yours,

"ANTONIO LASCALZO."

"I herewith accept and confirm the above agreement. It is understood that the amount for tiles to be paid to Mr. Lage is deducted of the contract of Mr. Lascalzo.

"JACOB WEINSTEIN."

In substance Lage was to furnish tiles for Lascalzo to lay, and Weinstein was to pay Lage for the tiles, and Lascalzo for the labor. At the close of the plaintiff's case, the defendants moved to dismiss the complaint as against the defendant Rachel Weinstein and the respondent admits that up to this time there was no proof to bind her. The plaintiff's contention is, however, that the proof was supplied by the evidence subsequently given by Jacob Weinstein. His testimony on this subject appears in the minutes where, on cross-examination, he testified that Rachel Weinstein, his wife, owned the house, and that he was her agent. If this statement be held sufficient proof of agency, the principal was liable and should have been sued alone, and, if held insufficient, then Jacob Weinstein was alone liable. We cannot discover upon what principle joint liability was adjudged. The general rule is that in cases where principal and agent are liable it is usually held that they cannot be sued jointly; plaintiff must elect which one he will hold, and a suit prosecuted to judgment against either, though without satisfaction, will discharge the remedy against the other. Mattlage v. Poole, 15 Hun, 556; Ency. Pl. & Pr. 16, 898.

Judgment reversed and new trial ordered, costs to abide event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed, new trial ordered, costs to abide event.

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ZEBULON S. TAYLOR, as Executor, Etc., Respondent, *v.* WALTER M. JACKSON, Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Action by an individual — An amendment cannot authorize him to replevy as an executor.

Where the plaintiff sues as an individual, he cannot replevy property which he alleges, in his affidavit for the writ, that he owns and possesses as executor of a decedent.

An amendment adding the word "executor" to the summons and to the affidavit for the writ of replevin is insufficient to confer jurisdiction, nor has the court power to amend, in this manner, an executed undertaking given by the plaintiff to procure the writ of replevin.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, ninth district, borough of Manhattan.

W. P. Schoen, for appellant.

F. Johnson, for respondent.

Per Curiam. There is no allegation in the affidavit submitted to support the writ of replevin which avers, in any issuable form, the fact that the plaintiff is the executor of Byron S. Sabin, deceased; the mere statement is made that he is such executor, and that as such executor he is the owner of and entitled to the possession of the goods in suit. While it thus clearly appears that, individually, the plaintiff made no claim to the said property, nevertheless he brought the action individually. A motion to vacate the writ for this reason was made, and denied, and upon this proceeding an amendment was allowed adding the word "Executor" both to the summons and the affidavit. Upon the trial a motion to dismiss was made which was disposed of by the learned trial justice saying: "While I do not agree with Judge Martin, the motion having been made before and granted by him, I have no power to review his action and am forced to proceed with the

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same as I find it." This was practically a denial of the motion. It will be noted that the amendments in each case were of the one word "Executor," which was purely descriptive. Casco National Bank v. Clark, 139 N. Y. 307. Furthermore the undertaking given to secure the writ cites Zebulon S. Taylor as the claimant of the property and the plaintiff in the action, and it surely cannot be seriously contended that the court had power to amend such executed instrument.

Judgment reversed and new trial ordered, costs to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed, new trial ordered, costs to abide event.

HENRY VONELLING, Respondent, *v.* THE METROPOLITAN STREET RAILWAY CO., Appellant.

(Supreme Court, Appellate Term, June, 1901.)

Negligence — Duty to look both ways at a street railroad crossing.

Upon crossing the tracks of a street railroad company, running north and south, it is the duty of the driver of a wagon, proceeding from west to east, to look for cars coming from both the north and the south and he is guilty of contributory negligence if he fails to do so.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, eighth district, borough of Manhattan.

H. A. Robinson (G. Glenn Worden, of counsel), for appellant.

G. Hamburger, for respondent.

Per Curiam. The only testimony to support the claim of negligence made by the plaintiff is given by the driver of his wagon which was struck by a car bound south on the east line of defendant's tracks. The driver, one Fedesio, testifies as follows: "Oct. 6th at half past seven as I was going over across 86th

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street from West to East, crossing the tracks, I looked *uptown*, and see no car in sight, as I was over it, and walking the horse going over it, I was struck by a car behind, and knocked the horse down, and knocked the wagon on top, and I and the boy were thrown out." When it is remembered that the wagon was moving from west to east, and was struck on the easterly track by a north bound car, there was contributory negligence upon part of the driver, from not having looked to the southward from whence the car was approaching. The complaint for that reason should have been dismissed. Had the driver looked in that direction, he would have seen the car, which at least was in plain sight.

Judgment reversed and new trial ordered, with costs to abide event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed, new trial ordered, with costs to abide event.

HENRY KATZ, Appellant, *v.* THE BROOKLYN HEIGHTS RAILROAD CO., Respondent.

(Supreme Court, Appellate Term, June, 1901.)

Negligence — Insufficient damages.

Where the plaintiff is permitted, in an action predicated upon negligence, to recover the reasonable expenses of medical attendance upon him made necessary by his injuries, the judgment must be reversed, at his instance, where he is allowed no recovery for the injuries themselves.

APPEAL from an order opening defendant's default and from the judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fourth district, borough of Manhattan.

I. Cohn, for appellant.

Sheehan & Collin, for respondent.

Per Curiam. We have concluded not to interfere with the order opening defendant's default. The disposition of such mat-

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ters rests so largely within the discretion of the trial justice that his discretion will not be disturbed, save in case of most manifest injustice. The order is affirmed, with ten dollars costs.

The second trial was submitted to the learned justice for decision, by consent, the jury having failed to agree. He ordered judgment for plaintiff in the sum of sixty-five dollars. This was the reasonable value of the services of the plaintiff's physician, as testified to on the trial. Having thus succeeded upon the issue of negligence, the plaintiff is without any compensation for his own injuries, being only repaid the reasonable value of his doctor's services. This is an injustice and cannot be tolerated.

Judgment reversed and new trial ordered, with costs.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs.

SAMUEL GANSER, Appellant, *v.* SAMUEL WEBER, Respondent.

(Supreme Court, Appellate Term, June, 1901.)

Sale — Refusal to accept an installment of an entire contract — Rescission.

Where the contract for a sale of goods is entire, the vendee's refusal to accept an installment of the goods is a breach which entitles the vendor to rescind.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, first district, borough of Manhattan.

Goldfogle, Cohn & Lind, for appellant.

Leonard A. Snitken, for respondent.

Per Curiam. This action was instituted under the following circumstances. The plaintiff was the owner of a cigar store situated in the city of New York, of which he made a bill of sale to the defendant for a consideration of $249, to be paid partly in

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merchandise and partly by the extinguishment of an antecedent debt. Simultaneously with the execution of the bill of sale the defendant executed an agreement in writing by the terms of which he agreed to deliver to the plaintiff leaf tobacco to the amount of $200, in two parts; the first of the installments of leaf tobacco was received by the plaintiff on July 25, 1900, and returned by him to the defendant the succeeding day, as being defective in quality. There was a conflict of evidence regarding the quality of the tobacco furnished, but, upon an examination of the testimony submitted, we are not inclined to disturb the finding of the trial court. The defendant's motion for a dismissal of the complaint upon the ground that the action was prematurely brought was properly denied. The contract of sale was entire and the refusal of the buyer to accept one of the installments constituted such a breach as gave the seller a right to rescind. Pope v. Porter, 102 N. Y. 366; Catlin v. Tobias, 26 id. 217; Van Sickle v. Nester, 34 Hun, 64.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

MARY P. LEWIS, Appellant, v. THE METROPOLITAN STREET RAILWAY CO., Respondent.

(Supreme Court, Appellate Term, June, 1901.)

Municipal Court of the city of New York — Removal to City Court.

Where the complaint, in an action for personal injuries brought in the Municipal Court of the city of New York, demands judgment for $245 with interest from a day stated, the case may properly be removed to the City Court of said city if the interest, if given by the jury upon the trial, would make the damages exceed $250 at the time when removal is sought.

APPEAL from an order of the Municipal Court of the city of New York, third district, borough of Manhattan.

Lewis & Harmstad, for appellant.

H. A. Robinson (G. Glenn Worden, of counsel), for respondent.

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Per Curiam. In the complaint the plaintiff demands "Judgment for two hundred and forty-five dollars, with interest from the 1st day of June, 1900." The action being for personal injuries, the jury may award the interest when demanded, if it should see fit. Its demand brought the claim beyond the sum of $250, and the order of removal is correct.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Order affirmed, with ten dollars costs.

THE TRANSCENDENT LIGHT CO., Appellant, *v.* THOMAS STEITZ, Respondent.

(Supreme Court, Appellate Term, June, 1901.)

Municipal Court of the city of New York—Plaintiff's right to discontinue.

Semble, that where a plaintiff is refused leave to discontinue an action in the Municipal Court of the city of New York at the close of his testimony, the refusal is reversible error.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, second district, borough of Manhattan.

Herbert J. Hindes, for appellant.

Aaron Morris, for respondent.

Per Curiam. Plaintiff asked leave to discontinue at the close of the testimony and such leave was refused. If exception had been taken to this ruling, judgment would have to be reversed. Rothenberg v. Filarsky, 30 Misc. Rep. 610. No exception was taken, and plaintiff's omission in this respect is fatal.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

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Matter of the Application of JACOB BRENNER to Compel the Delivery to him by WILLIAM E. MELODY of the Books and Papers of the Office of Commissioner of Jurors.

(Supreme Court, Kings Special Term for Motions, June, 1901.)

Stay of an order requiring delivery of the books and papers of an office to a claimant, under Code C. P., § 2471a — Semble, that L. 1901, ch. 602, is unconstitutional — Duties thereunder ministerial — Commissioner of jurors of Kings county not an adjunct of the Supreme Court — Manner of his appointment — "Hereafter", in a Constitution, construed — Consts. of 1846 and 1894, art. X, § 2.

Section 2471a of the Code of Civil Procedure, relative to compelling delivery of the books and papers of an office can be invoked only by a claimant who has an unquestionable *prima facie* legal title to the office; and therefore where a grave constitutional question existed as to the legality of the claimant's appointment the court stayed an order, requiring the incumbent to deliver him the said books and papers, until the constitutional question should have been decided on the incumbent's appeal.

Semble, that chapter 602 of the Laws of 1901, relative to the appointment of a commissioner of jurors for Kings county, is unconstitutional not only because it authorizes justices of the Supreme Court to appoint to a county office, and one which the said statute recognizes as still existing, but also because the statute shortens the term of the office.

That the duties thereby imposed upon the justices are ministerial and not judicial and that in appointing the claimant the justices did not judicially determine that the statute was constitutional.

That the duties of commissioner of jurors of Kings county belonged, under the Revised Statutes, to the county clerk of the county, were transferred by the Legislature in 1858 to a commissioner of jurors appointable by certain county officers, and that the office had since continued to be a county office whose incumbent must be appointed by county officers.

That the office was not a "local" one in any sense which could affect the manner of appointment to it, and that it was not an adjunct of the Supreme Court in such a sense as to make it incapable of being a county office.

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That, assuming that the said statute created a new office and abolished the old, section 2 of article X of the Constitution of 1894 impounded and protected the duties of the office (constituting the office itself), and made it impossible for the Legislature to transfer them to a new officer, not elected, and not appointed in the manner prescribed by the Constitution of 1894.

That where the word "hereafter" occurred in a new and complete Constitution, like that of 1894, it should be construed as meaning after the time of the adoption of that Constitution, and that consequently the contention, that the said constitutional provision was to be construed and applied as of the time of its first adoption in 1846, thus bringing the said commissioner of jurors, created in 1858, among "officers whose offices may hereafter be created by law," and leave the Legislature free to direct the manner of his appointment, was untenable.

MOTION for a stay on appeal from an order herein requiring the respondent, who holds the office of Commissioner of Jurors of the county of Kings, to deliver to the petitioner the books and papers of such office.

Robert H. Elder for motion.

Henry W. Goodrich opposed.

GAYNOR, J.: Of course the stay on appeal must be granted. There is no reason to deny it. There is conceded to be a grave question of the constitutionality of the act under which the petitioner was appointed to the office. That being so, the petitioner is without that clear legal title to the office which is necessary to entitle him to an order requiring the books and papers of the office to be turned over to him by the incumbent. The statute (Code Civ. Pro. sec. 2471a) allowing an application like this by "a public officer" for a summary order committing to jail any one who has possession of books and papers of the office, and refuses to deliver them to him, was not intended for a case where the applicant has not got into the office and thereby become "a public officer" for the reason that the office is in the adverse possession of another claiming under a title. At all events, the ap-

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plication cannot be made against such an incumbent when the title to the office as between the rival claimants is open to question and is in question, as is the case here. The statute only applies to cases where the applicant has an unquestionable *prima facie* legal title. By its terms it permits of no controversy as to title, but only of a hearing and decision of the bare question whether the person proceeded against has possession of such books and papers. If the title to the office be actually in question, the applicant has to be left to an action to oust the incumbent.

But if the test of the right to grant the order appealed from here were not the minor one whether the title is in genuine dispute, but the major one whether the act under which the petitioner claims is valid, and his title therefore good, then the reasons for deeming the act invalid are so grave that the usual fit and orderly course is to stay the enforcement of such order until the appeal from it can be decided.

I cannot accept the statement that the appointing officers under the act made a judicial determination of its constitutionality by appointing the petitioner. They could not judicially decide the question. They acted under no judicial sanction whatever. Their duty of appointing was not judicial, but purely ministerial (Gilbert v. Board of Supervisors, 136 N. Y. 180). They could have been required by this court by a writ of mandamus to make the appointment if the act be constitutional, and if it be not they could have been restrained in a proper suit from making the appointment, so as to settle the question in advance, and avoid a disturbance of the office (Rathbone v. Wirth, 150 N. Y. 459). That they hold high judicial positions makes no difference, and it would be unfair and a just reproach to this court to permit that fact to warp the course of justice. It is so well known to our learned profession that there can be no judicial determination except upon due process of law as prescribed by the constitution, the very essence of which is a judicial hearing upon due notice prescribed by law to those to be affected in their rights, that it does not need to be so much as mentioned. The contrary suggestion is so feeble that I suppose I could by common consent have passed it by without notice.

By act chapter 322 of the laws of 1858 the duties of making up the county jury lists and drawing jurors in Kings county were transferred from the county clerk, to whom they had theretofore

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belonged (2 R. S. p. 411), to an officer created by the said act and therein named "Commissioner of jurors for the county of Kings." The act provided that such new officer should be appointed by certain specified county officers, viz., the county judge, the district attorney, the sheriff, the surrogate and the two side justices of the court of sessions.

This office of commissioner of jurors for the county has remained ever since. The legislature has changed the appointing power from time to time (chap. 378, Laws of 1862; chap. 821, Laws of 1866; chap. 315, Laws of 1870), being careful, however, to keep it in county officers as required by the constitution in respect of appointive county officers; until by act chapter 602 of the laws of this year it professed to take it away from such county officers, viz., the two county judges, the surrogate and the county treasurer, and confer it on certain state officers, viz., the Justices of the Appellate Division of the Supreme Court of the second judicial department. It is claimed that this act is unconstitutional. A similar bill was passed last year, but the opinion of all of the judges and lawyers who considered it being that it was unconstitutional, the Governor did not allow it to become an act.

Section 2 of article X of the new constitution adopted in 1894 provides as follows:

"All county officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the Legislature shall direct." This is followed by a similar provision in respect of city, town and village officers; and the section then closes with a general provision that "All other officers, whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct."

1. At the time of the adoption of the constitution of 1894 this office of commissioner of jurors had existed as a county office since 1858, and the said provision has to be deemed as adopted with reference to it and all other local offices then existing (Rathbone v. Wirth, 6 App. Div. p. 311; *id.* 150 N. Y. p. 473; People v. Rathbone, 145 N. Y. p. 438). The act in question does not create, or profess to create, a new office. On the contrary, it

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recognizes an existing county office, abridges the term of the incumbent and changes the appointing power from county to state officers. This is plainly against the constitution.

2. It is now said, however, and for the first time, that the office is not a county office, although in its creation it was required to be filled as such (*i. e.*, by appointment of county officials), and has for 43 years been deemed such by all of us. Its true designation is said to be not a county office but a "local" office. This is a new use of that term in the nomenclature of offices. It has heretofore been used only in its generic sense to designate all excepting state offices. It may well be doubted whether this new use of it has any sanction, or, indeed, any meaning. By the framework of government established by the constitution we have state, county, town, city and village offices. To say that an office was a local one has always meant that it was not a state office, but an office of one of the political subdivisions or municipal corporations of the state; and such is the statutory definition (Pub. Of. Law, sec. 2).

The suggestion seems to be that this office of commissioner of jurors as created in 1858 was and is such an adjunct of the Supreme Court as to be a part thereof, and therefore incapable of being a county office. It is conceded not to be a state office; but at the same time it has to be admitted that it is an office, and so it is called a "local" office. I own to not quite understand this. The relation of the commissioner of jurors to the Supreme Court is not so intimate as that of the county clerk. Nor does he belong to the staff of the Supreme Court. It could with as much reason be said that he belongs to that of the county court. His panel of jurors is for the use of the county court and the Supreme Court alike; and prior to the new constitution of 1894 he had no relation at all to the Supreme Court, for up to that time it used no jurors, and the commissioner's panel was for the county court, the court of sessions, the city court of Brooklyn, the circuit court and the court of oyer and terminer, the last two also being only county courts (Code Civ. Pro. sec. 1, unamended).

The office was therefore not created in 1858 as an adjunct or part of the Supreme Court. If the legislature could in 1858 have empowered some court, or the judges thereof, to appoint a clerk or commissioner of that court to provide it with jurors, no such thing was done. On the contrary, a county office to provide jurors

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for all of the courts of the county, and to be filled by designated county officials in the manner prescribed by the said constitutional provision (for it was first adopted in the constitution of 1846), was created, and it has existed ever since.

3. But if the said act of this year could be construed as abolishing the said office of commissioner of jurors of Kings county, and creating a new office which is not a county office, it would still be violative of the said constitutional provision and void; for it is the "duties" of an office which constitute the office, and it is such duties that are protected and covered by the said provision, so that they cannot be taken out of the protection of such provision, and transferred to an officer not elected or appointed in the said prescribed manner, *i. e.*, elected by the electors of the county or appointed by county officials, as has so often been pointed out by our highest court. Immediately on its adoption in 1894 such provision impounded, so to speak, all duties which then existed in county officers, *i. e.*, it perpetually restricted the performance of such duties to such officers, or to other county officers elected or appointed in the said prescribed manner to whom the performance of such duties might be transferred by the legislature. It did not make it impossible for the legislature to transfer such duties to a new officer (except, of course, in cases where they are imposed by the constitution itself on a particular officer), but it did make it impossible for the legislature to transfer them to a new officer not elected or appointed in such prescribed manner.

This has been uniformly decided by our highest court from the beginning, and is so well known to our learned profession, that the citation of the authorities for it might well be omitted. That the said constitutional provision covered the official duties lodged in local officers at the time of its adoption, and that such duties could not thereafter be transferred by the legislature to new officers not elected or appointed in such prescribed manner, was perceived from the start; for otherwise such provision could be frittered away by the process of transferring such duties to newly created officers not so elected or appointed, and the purpose of such provision, *i. e.*, "to secure to the several recognized civil and political divisions of the state the right of local self government" (People ex rel. Bolton v. Albertson, 55 N. Y. p. 56; People ex rel. Williamson v. McKinney, 52 N. Y. p. 378), set at naught. This was first clearly stated by Judge Bronson in *Warner* v. *Peo-*

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ple (2 Denio, 272) in respect of a similar provision in the constitution of 1821 concerning county clerks and sheriffs, viz.:

"I do not doubt that the legislature can regulate the duties, and reduce or take away the fees of the officer, and it may perhaps abolish the office. But so long as the duties and emoluments of the office remain, the choice of the officer belongs to the electors of the county. They cannot be deprived of their right by changing the name of the office, nor by dividing it into parts, and transferring the selection of one of the officers to another body. If the office may be divided, and the duties be assigned to two officers, both must be chosen by the electors of the county. No other rule will give full effect to the constitution."

The same was stated with precision in respect of the constitutional provision now under consideration by the two learned judges who wrote in *People* v. *Raymond* (37 N. Y. 428). Judge Grover there said:

"The plain intention of the section of the Constitution in question, was to preserve to localities the control of the official functions of which they were then possessed; and this control was carefully preserved consistent with the power of the legislature to make needful changes by restricting the power of appointment of other officers to perform the same functions to the people, or some authority of the locality." And Chief Judge Hunt said: "In effect the legislature have divided the duties of assessors, as they existed in 1846, and have given an important part of them to commissioners of taxes and assessments. The assessors are elected by the city and county authorities, or divisions of them; and, under article ten, section two, these commissioners must be elected in the same manner. The present law is in violation of this principle."

And in *People* ex rel. Bolton v. *Albertson* (55 N. Y. 50) the same is again said so plainly as to leave no doubt, viz.: "The Constitution cannot be evaded by a change in the name of an office, nor can an office be divided and the duties assigned to two or more officers under different names, and the appointment to the offices made in any manner except as authorized by the Constitution."

It is not enough to create a new "officer", or change the name of the office or officer, but the "office" must be new, *i. e.*, the duties constituting it must be new, in order that the election or

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appointment of such officer in the said prescribed manner may be departed from, as is tersely summed up in a sentence in *People* v. *Pinckney* (32 N. Y. p. 386), viz.: "The test, therefore, must be whether the functions conferred are substantially new in the sense that they were not exercised by public civil officers at the time the Constitution was adopted."

That the true construction of the said constitutional provision is that it covers and protects the local official duties and functions existing in local public officers at the time of its adoption from being transferred to officers not elected or appointed in the prescribed manner, is attested by an unbroken line of decisions (Warner v. People, 2 Denio, 272; People v. Pinckney, 32 N. Y. 377; Devoy v. Mayor, 36 N. Y. 449; People v. Raymond, 37 N. Y. 428; Metropolitan Board of Health v. Heister, 37 N. Y. p. 666; People ex rel. Williamson v. McKinney, 52 N. Y. 374; People ex rel. Lord v. Crooks, 53 N. Y. 648; People ex rel. Bolton v. Albertson, 55 N. Y. 50; People ex rel. McEwan v. Keeler, 29 Hun, 175; People ex rel. Sinkler v. Terry, 108 N. Y. 1; Rathbone v. Wirth, 150 N. Y. 459; People ex rel. Burby v. Howland, 155 N. Y. 270.)

4. But it is suggested that such constitutional provision must be construed and applied as of the time of its first adoption, viz., in the constitution of 1846, which would bring the said office of commissioner of jurors under the head therein of "officers whose offices may hereafter be created", for it was not created until 1858, as we have seen.

(a). This suggestion arises upon the assumption that the legislature was left free by the words of the said constitutional provision to provide for the election or appointment of new county, town, city or village officers in any manner it saw fit. It is difficult to see how such meaning is to be got therefrom, although there is seemingly a *dictum* for it in the *Draper* case, which has been repeated in other cases where, also, the question was not up at all (People ex rel. Wood v. Draper, 15 N. Y. 532; People v. Pinckney, 32 N. Y. 377; Sturgis v. Spofford, 45 N. Y. 446; Fire Department v. Atlas Steamship Co., 106 N. Y. 566). And on closely reading the opinion in *People* ex rel. *Kingsland* v. *Palmer* (52 N. Y. 83), it is not altogether clear that it was not so restricted as to exclude the point. In the *Draper* case nothing was before the court and actually decided except (1) that the legisla-

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ture had power to establish new civil divisions of the state other than those provided for by the constitution, and (2) provide that the offices of such new divisions should be filled by appointment of the governor and senate (Metropolitan Board of Health v. Heister, 37 N. Y. p. 667). Such offices being neither county, town, city nor village offices, the said requirement of the constitution in respect of the filling of the latter, was plainly not applicable to them. But the court did not hold that new county, town, city or village offices could be filled by appointment of state officers, any more than by election by the electors of the whole state.

The main provision is for the election of "existing" local officers by the local electors, or else for their appointment by local officials, "as the legislature shall direct"; *i. e.*, the legislature may direct which. The final sentence, that all other officers whose election or appointment is not provided for in the constitution, and all officers "whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct", seems not only by society and identity of words and unity of intention, but literally, to follow the same meaning in respect of after created county, town, city or village offices; *i. e.*, "the legislature may direct" whether they shall be elective or appointive; but when that choice is made by the legislature, the "manner" of the election or appointment must be that previously prescribed, *i. e.*, by the local electors or by local officials. If this be not so, then the legislature may as to such offices prescribe the manner of the election or of the appointment without restriction; and if this be so then it may prescribe election by the electors of some other political or corporate subdivision, or of the whole state, or appointment by officials of such other subdivision, or of the state; for if it be said that the words used leave the manner of appointment unrestricted, it must be said that they leave the manner of election unrestricted also; they are one sentence and make no distinction. It does not seem that such a meaning can be attributed to the framers of the constitution, for it would be out of harmony with the whole system and framework of state and local government which it was their purpose to establish.

(b). But however this may be, the construction of such provision as of the time of its adoption in 1846, instead of in 1894,

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is not permissible. The settled rule of construction is to the contrary, *i. e.*, that the word "hereafter" must be taken to speak from the adoption of the constitution of 1894, which is not an amendment of the constitution of 1846, but a complete new constitution. This has always been the rule declared by statute for the construction of the words "hereafter" and "heretofore" in respect of our successive revisions and codifications of statutes (2 R. S. p. 778, sec. 10; Code Civ. Pro. sec. 3343, sub. 22; Stat. Constr. Law, sec. 9); and the same rule applies to the constitution (People ex rel. Jackson v. Potter, 47 N. Y. p. 379; Wynehamer v. People, 13 N. Y. p. 427; Riggs v. Shannon, 27 Abb. N. C. 456, note; Rathbone v. Wirth, 6 App. Div. p. 311; *id.* 150 N. Y. pp. 473, 482). In the first of these cases it was said that "the same rules apply to the construction of a constitution as to that of a statute law"; and also as follows: "A constitution is to be held as prepared and adopted in reference to existing statutory laws upon the provisions of which in detail it must depend to be set in operation"; and the same thing is said in *People* v. *Rathbone* (145 N. Y. p. 436). In the *Wynehamer* case the provision of the constitution of 1846, "that trial by jury in all cases in which it has heretofore been used shall remain inviolate forever", was under construction. The case in which trial by jury was there claimed was one in which the right existed by statute when the constitution of 1846 was adopted, but did not exist when the first constitution, *i. e.*, that of 1777, which contained the same provision, was adopted. It was therefore argued that the word "heretofore" had to be referred back to the constitution of 1777, to which judge Johnson said: "Writings are to be construed as to the time when they are made, and 'heretofore' in this clause means before 1846, and cannot, to limit its meaning, be carried back to 1777, and confined to the cases which, at that earlier period, were triable by jury"; and this was followed by the court.

5. But if such interpretation as of the date of 1846 were permissible, the result here would be the same, for, as we have seen, the constitutional provision covered the official duties of making up the county jury lists and drawing jurors. The learned and able men, now passed from among us, who drew the said act of 1858 creating a commissioner of jurors in this county, and transferring to him from the county clerk the said duties, well under-

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stood that the said provision in the constitution of 1846 covered such duties, for the reason that they existed in the office of county clerk at the time such constitution was adopted. They were therefore careful to have such act provide that the new officer should be appointed by county officials. They knew that such duties could not be taken out of the protection of such constitutional provision, and transferred to a new officer not elected by the electors of the county or appointed by some county official or officials as therein prescribed. There may be duties so inherent by ancient lineage in certain officers made elective by the constitution, that they could not be transferred to another officer at all, or, at all events, to one not also elective (People ex rel. McEwan v. Keeler, 29 Hun, 175; State v. Brunst, 26 Wisc. 414; People ex rel. Burby v. Howland, 155 N. Y. 270), but the duties of selecting and summoning jurors are not of that unique character. As a rule the constitutional requirement under consideration is satisfied if the duties be kept with an officer either elected or appointed in the prescribed manner; they may be transferred from an appointive to an elective officer, and *vice versa*.

6. The point that the petitioner has not filed an official bond is not in the record; and if it were it is only technical and should be waived; or he may file it *nunc pro tunc* if he is required to file a bond by law and has not done so.

The stay is granted.

Matter of the Application of JOHN DOWLING for a Writ of Mandamus *v.* A. EMERSON PALMER and THOMAS E. BUSSEY, Secretary and Treasurer, respectively of the Board of Education of the City of New York.

(Supreme Court, Kings Special Term for Motions, June, 1901.)

New York City — Public school janitor's salary — His personal assistants should not be shown on the payroll.

The names of persons whom a regularly appointed janitor of a public school of a borough of the city of New York employs at his own expense to help him sweep and scrub should not be carried on the monthly payroll, although the secretary of the city civil service

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commission has required this to be done; but the mere presence thereon of such names does not justify the city board of education in refusing to pay the janitor his monthly salary where the roll shows him to be a janitor and states his yearly compensation as well as the amount presently due him from the city.

THIS is an application for a peremptory writ of mandamus against the secretary and the treasurer of the Board of Education of the City of New York to require them to draw and sign a warrant to the petitioner for his pay of $203.75 for May, 1901, as janitor of public school No. 26 in the borough of Brooklyn.

Sanders Shanks for application.

Luke D. Stapleton opposed.

GAYNOR, J.: By section 1075 of the city charter it is provided that janitors of the public school houses shall be appointed by the borough school boards. It is conceded that this petitioner is and has been for several years janitor of public school No. 26 in Brooklyn borough at a fixed compensation of $2,445 a year, payable monthly. The payroll presented to the said secretary shows that the petitioner is such janitor at the said yearly compensation, and in the appropriate column the sum of $203.75 is set down as due to him for May, 1901. This suffices to require that he be paid.

The reason given for refusing to draw a warrant to the petitioner for the said sum due him is that on the payroll there appear in connection with his name the names of the persons he employs to help him sweep and scrub, and the amounts he pays them therefor. It appears that heretofore this information has never been on such payrolls, but that the secretary of the municipal civil service commission required that it should be put on this payroll for May and thereafter. There is no authority for this requirement. The school board is required by law to appoint a janitor to care for and clean each school house. He necessarily has to employ more or less help, but that is a thing with which city officials have nothing to do. Such helpers are not paid by the city, and their names on the payroll are mere surplusage; as much so as would be the names of the employees of any contractor with the city. The respondents are quite right

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in saying that such matter should not be on the payroll, and in asking for a judicial decision thereon. At the same time such surplusage on the payroll is not a reason for refusing the petitioner the writ he prays for.

This payroll is certified by the assistant secretary of the said civil service commission to the effect that the persons named thereon are appointed or employed under the civil service law, which means from the civil service eligible lists. This cannot refer to the said helpers, for if it did it would be untrue. It refers only to the janitors, the said information as to helpers being useless surplusage. The payroll shows the necessary facts as to this petitioner, *i. e.*, that he is the janitor, that his yearly pay is $2,445 and that $203.75 is due him for May; and he and all the other janitors should now be paid without putting them to the trouble and expense of compelling new payrolls to be made out, and to pass the various stages of routine. The payrolls can hereafter be made without containing such surplus matter and the secretary of the civil service commission can be required by writ of mandamus to certify them; if, indeed, such certification be necessary at all (People ex rel. Wilson v. Knox, 45 App. Div. 537).

No objection to this application as the proper remedy was taken by the learned counsel for the city, but on the contrary with commendable fairness he united in requesting that the court decide the dispute involved for future guidance and in order to save these janitors further trouble and expense.

Let the writ issue.

LENA BURKERT, Plaintiff, *v.* MINNIE A. BENNETT, et al., Defendants.

(Supreme Court, Kings Special Term for Motions, June, 1901.)

Pleading — Insufficiency — Repetition of denials in a defence — Denial on information and belief — Partial Defence — Code C. P. §§ 500, 507, 508.

A defence cannot be struck out for insufficiency, the remedy being by demurrer.

Introductions to each of several defences in the words: "And repeating the allegations and denials hereinbefore set forth as com-

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pletely as if herein fully set forth" must be stricken out as irrelevant and redundant, as a defence must be complete in itself and must consist of new matter, outside of the issues raised or which can be raised by a denial.

An allegation that "the defendants denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of the complaint numbered first, second and third" is not a denial that the defendants have any knowledge or information, and besides is bad as a denial in gross, instead of a denial of each allegation.

If a defence is not pleaded as partial it is to be taken as complete, and therefore, the pleader cannot be compelled to state whether it is partial or complete.

MOTION to strike out parts of the answer.

E. G. Higginbotham for motion.

C. M. Stafford opposed.

GAYNOR, J.: It would be difficult to draw a more illiterate and unscientific answer; but the plaintiff has mistaken the remedy against most of it. The four so-called "defences" cannot be struck out for insufficiency. The remedy is demurrer. The introduction to each one, however, in these words, viz., "and repeating the allegations and denials hereinbefore set forth as completely as if herein fully set forth", must be struck out as irrelevant and redundant. A "defence" must be complete in and of itself, and can consist only of "new matter" which constitutes a defence to the action, *i. e.*, new matter which, taking the complaint to be true in all of its allegations, nevertheless defeats the action. "New matter" is matter outside of the issues raised or which could be raised by a denial. There can be no denial of the complaint or of any part of it in a "defence". A "denial" and a "defence" are distinct and separate parts of an answer (Code Civ. Pro., § 500; Hinchcliffe v. Staten I. R. Co., 34 Misc. Rep. 49, and cases there cited; Durst v. Brooklyn H. R. Co., 33 Misc. Rep. 124).

The first denial in this answer is that "the defendants denies any knowledge or information sufficient to form a belief as to

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the allegations contained in the paragraphs of the complaint numbered first, second and third." Apart from the grammatical feature (which I suppose we must shut our eyes to), this is no denial. It is not a denial that "the defendants" have any knowledge or information, and it is besides in gross, instead of being of each allegation as required by the Code. It should be in so many words that the defendants deny that "they" have any knowledge or information of any of the allegations contained in the said paragraphs sufficient to form a belief thereof (Code Civ. Pro. § 500). But the plaintiff has no reason to complain of a so-called denial which is no denial.

The part of the motion that the defendants make the answer more definite and certain by stating whether each defence is a partial or complete defence is denied. If a defence be not pleaded as a "partial" defence it is taken to be pleaded as a complete defence (Code Civ. Pro., §§ 507–8).

Let an order be entered in accordance with the foregoing, with $10 costs.

THE PEOPLE ex rel. JOHANA DONOHUE, Relator, v. WILLIAM WALTON, as Sheriff of Kings County, Respondent.

(Supreme Court, Kings Special Term for Motions, June, 1901.)

Crimes — Trial on Sunday void — Code C. P., § 6, construed.

A trial on Sunday, for the offense of vagrancy, is not authorized by the common law nor permissible under section 6 of the Code of Civil Procedure, and therefore, a conviction and commitment rendered and made on that day are void.

HEARING of the issue raised by a demurrer to a return to the writ of habeas corpus.

Mitchell May for relator.

Robert H. Elder opposed.

GAYNOR, J.: By the return it appears that the relator is detained in the county jail under a warrant of commitment made

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by a magistrate of the City of New York. The certificate of conviction and warrant of commitment (Code Crim. Pro., §§ 891–2) recite that she was brought before the said magistrate on June 2, 1901, upon complaint of being a vagrant, and that on the said day the magistrate heard the case and convicted her, and committed her to the county jail for one month at hard labor.

As the day was Sunday it is claimed that the certificate of conviction and warrant of commitment are void. This is so. At common law no judicial act could be done on Sunday (Story v. Elliot, 8 Cow. 27; Van Vechten v. Paddock, 12 Johns. 178). The same rule is substantially declared by section 6 of our Code of Civil Procedure. The reservation therein that " this section does not prevent the exercise of the jurisdiction of a magistrate, where it is necessary to preserve the peace, or, in a criminal case, to arrest, commit or discharge a person charged with an offense", does not permit of a trial on Sunday. The words "commit or discharge" have no reference to a trial. They mean simply that persons arrested can be discharged on Sunday by a magistrate if there be no ground for holding them, or that they can be committed for a hearing if that be the proper course.

The relator is discharged.

JAMES SARGENT, Plaintiff, *v.* THE BOARD OF EDUCATION OF THE CITY OF ROCHESTER et al., Defendants.

(Supreme Court, Monroe Special Term, June, 1901.)

Schools — Right of Rochester board of education to pay salaries to teachers in a local orphan asylum — Constitution of 1894, art. VIII, § 14; art. IX, § 4; L. 1894, ch. 556, tit. 15, art. XII; L. 1898, ch. 660.

An orphan asylum, giving instruction to the inmates as an incidental purpose but giving no religious instruction to them during school hours, is not a "school or institution of learning" within section 4 of art. IX of the Constitution of 1894 forbidding the State or any subdivision thereof from aiding or maintaining, by its property, credit or by public money, a school or institution of learning in which any denominational tenet or doctrine is taught.

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Where such an orphan asylum, located in Rochester, is subject to the rules and regulations of the common schools of the State and to visitation by the State board of charities, the city board of education may, as agent of the city, under the authority of section 14 of article VIII of the said Constitution, that of the Consolidated School Law, and that of its charter, pay salaries of teachers of the asylum out of moneys raised by the city by direct taxation.

MOTION for a temporary injunction.

David N. Salisbury, for motion.

James M. E. O'Grady and Porter M. French, opposed.

RICH, J. The plaintiff brings this action as a taxpayer of the city of Rochester, to restrain its board of education and its financial officers from paying the salaries of four teachers of the St. Mary's Boys' Orphan Asylum of said city.

It appears that this orphan asylum was incorporated in December, 1864, for the "maintenance and tuition of orphan children of the male sex, and in particular the male orphan children of soldiers who have lost their lives in the service of the United States"; that said corporation is the successor of a similar corporation which had been in existence in Rochester for many years; that since its incorporation the city of Rochester, through its board of education, has contributed to said corporation for the purpose of the secular education of the orphans under the charge of said asylum; that such secular education corresponds to and is the same as that furnished to children of like age in the public schools in the city of Rochester, the same system of grades, the same course of study, the same text-books, the same examinations and the same hours of study being submitted to and made use of in the secular education of the inmates of said asylum; that under the rules of said asylum no denominational tenet or doctrine is taught or religious instruction imparted in said asylum during the hours of school prescribed by the rules and regulations of the board of education of the city of Rochester. It further appears that the four teachers whose salaries it is sought by this action to cut off, have been in the employ of the board of education, one

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for thirteen years, one eleven years, one eight years, and one three years; that all of these teachers are educated and experienced teachers. It further appears that said asylum is subject to visitation by the State Board of Charities, and that inmates of said asylum are received and maintained pursuant to rules established by the State Board of Charities.

It will thus be seen that there has been an acquiescence of nearly forty years on the part of those in authority with the present method of imparting instruction to the orphan children committed to the charge of this institution, and this has not been without authority, both legislative and judicial. The Legislature, in 1850, passed an act for the better education of the children in the several orphan asylums in this State, in which it is provided that "the schools of the several incorporated orphan asylums within this State other than those in the City of New York, shall participate in the distribution of the school moneys, in the same manner, and to the same extent, in proportion to the number of children educated therein, as the common schools in their respective cities or districts." It was held by the Monroe General Term, in 1867, in the case of St. Patrick's Orphan Asylum v. Board of Education, 34 How. Pr. 227, that this act was constitutional so far as it applied to moneys raised by taxation in the city of Rochester, but that the Constitution might interfere with the use of any of the common-school fund held and disbursed by the State, inasmuch as orphan asylums are not common schools within the meaning of the Constitution. It does not appear in this case that the salaries for these teachers are paid out of the common-school fund.

On the contrary, it appears that the funds out of which these salaries are paid were raised by direct taxation upon the property assessed in the city of Rochester. The act of 1850 has been incorporated into the Consolidated School Law (now in force), L. 1894, ch. 556, title XV, article 12, which reads as follows:

"The schools of the several incorporated orphan asylum societies in this state, other than those in the city of New York, shall participate in the distribution of the school moneys, in the same manner and to the same extent, in proportion to the number of children educated therein, as the common schools in their respective cities or districts. The schools of said societies shall be subject to the rules and regulations of the common schools in

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such cities or districts, but shall remain under the immediate management and direction of the said societies as heretofore."

We have, then, direct legislative authority for the present method of imparting instruction to the inmates of this orphan asylum. The plaintiff, however, contends that the payment of the funds of the city for teaching in such school is in violation of section 4 of article IX of the Constitution.

That section provides that "Neither the State nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

The first question is, therefore, is an orphan asylum a "school or institution of learning" within the meaning of this section? It is plain that sections 1 to 4 of article IX have reference to the public-school system of the State, and that the phrase "school or institution of learning" must be considered with reference thereto.

In defining an institution, regard must be had to its main and essential features. An orphan asylum is organized mainly as a shelter, a home for fatherless and motherless children. It takes the place of a home to them, and the State steps in and says it will supply them the same instruction as the common schools offer to more fortunate children. The instruction given is incidental to the main purpose of the asylum. So it has been held that an orphan asylum was not a common school. People v. Board of Education, 13 Barb. 400; St. Patrick's Orphan Asylum v. Board of Education, 34 How. Pr. 227.

If an orphan asylum is not a school or institution of learning, this provision of the Constitution does not apply, and section 14 of article VIII does apply. For that section provides that nothing in the Constitution shall prevent any county, city, town or village from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions whether under public or private control."

Upon this view there is no conflict between the two sections of the Constitution referred to. This construction agrees with the

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opinions Mr. Choate and Mr. Root expressed in the constitutional convention of 1894, and with the dicta of the Court of Appeals. People ex rel. New York Institute for Blind v. Fitch, 154 N. Y. 14; People ex rel. Inebriates' Home v. Comptroller, 152 id. 399.

I think also, that the board of education is the agent of the city of Rochester, intrusted with one branch of the city's work, and that when the Constitution, in section 14 of article VIII, says that nothing shall prevent a city from providing for the secular education of inmates of orphan asylums, it means that the proper boards, officers or agents of such city should have the charge of providing such education. A city necessarily acts through boards and officers who have charge of definite spheres of action, and where a statute or constitutional provision applies to a city as a whole, it must likewise apply to all of its departments.

It is also contended by the plaintiff, that inasmuch as the board of education derives its power from that part of the charter passed in 1898, known as the Dow Law (chap. 660), there is no authority in that law for payments to teachers in orphan asylums. I think, however, that inasmuch as that law makes the power of the board of education subject to the general statutes of the State, section 126, that the provision of the Consolidated School Law in reference to orphan asylums referred to above, applies to said board of education, and it has power to provide for teachers in said asylums. It follows also, that if the acts of the board of education in employing heretofore the four teachers who are made defendants were lawful, then said teachers were in the employ of the board and are protected by section 140 of the Dow Law, which exempts such teachers from the conditions as to qualifications or eligibility imposed by that act.

The motion for an injunction should, therefore, be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

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Matter of the Application of THE MANHATTAN RAILWAY CO., *v.* WILLIAM G. COMSTOCK, as Substituted Trustee, under the Last Will and Testament of NEHEMIAH U. TOMPKINS, Deceased, et al., Relative to acquiring Title to Certain Real Property, Etc., Defendants.

(Supreme Court, New York Special Term, June, 1901.)

Condemnation proceedings — Assessment of fee damages must be of the date of the award.

An assessment of fee damages must be of the date of the award, and where the report of the commissioners found the damages as existing at a date nearly a year prior to the award the court refused to confirm the report.

MOTION to confirm report of commissioners appointed to ascertain the compensation to be made the defendants herein, as owners of the property taken for the public use and motion by the guardian *ad litem* for an extra allowance.

Ritch, Woodford, Bovee & Wallace (C. N. Bovee, of counsel), for motion.

Charles A. Gardiner (William H. Godden, of counsel), opposed.

James C. Bushby, guardina *ad litem* for certain infant defendants.

GIEGERICH, J. This matter was sent back to the commissioners by an order of this court, which invested them "with the same jurisdiction, powers and duties as they possessed upon their original appointment," and which further "authorized and directed (them) to meet * * * on the 26th day of April, 1901, at 2 o'clock in the afternoon of that day, and proceed herein according to law." At such meeting an attempt was made on the part of the railroad company to reopen the hearing of evidence and to recall certain witnesses to explain and correct portions of their testimony, and also to show that very important changes had been made since the last previous hearing of the commission, consisting

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in the demolition of the old structure standing upon one of the lots in question and the erection instead of a modern and costly building. This motion was denied by a divided vote of the commissioners, the chairman alone favoring the application and refusing to sign the present report upon various grounds which he has specified in a memorandum annexed thereto. The report purports to ascertain the damages as of June 26, 1900, the date of the first report referred to above, although the present report is dated and was in fact signed on the 20th day of May, 1901. On behalf of the railroad company various objections are made to the confirmation now moved for, but only one of these need be considered, namely, that the report does not find the damages existing at the time the award was made, but as existing at a date nearly a year previous, this objection being well taken, in my view. The rule applicable in such cases is stated in Matter of New York Elevated Railroad, 76 Hun, 384, 388, as follows: "The inquiry in condemnation proceedings is to be directed to an ascertainment of the net result to the property as of the time of the award. * * * The assessment of fee damage is *eo instanti* as of the date of the award." If the rule be as just stated, it follows that the commissioners had no power to make a report *nunc pro tunc,* as was attempted in this case, and the report, therefore, cannot be confirmed. It results that the motion to confirm the report of the commissioners must be denied; that the report be set aside for the irregularity noted, and a rehearing be had before the same commissioners. The motion for an extra allowance made by the guardian *ad litem* may be renewed when the report is presented for confirmation hereafter. Order to be settled on two days' notice.

Ordered accordingly.

Matter of the Application of HARRIOTT W. ARMSTRONG et al., for Leave to Issue an Execution.

(Supreme Court, New York Special Term, June, 1901.)

Leave to issue execution after five years — Judgment not assailable — Moving parties — Code C. P., §§ 1376, 1377.

Upon an application for leave to issue execution after the lapse of five years from the entry of final judgment in an action, the court

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will not inquire into the validity of the judgment nor permit the judgment-debtor to show that no summons was ever served upon him in the action.

Where a firm composed of two partners recovered the judgment on a firm debt, and one partner thereafter died, the court held that the executrix of the deceased partner might properly join with the survivor in the application for leave.

MOTION for leave to issue an execution on a judgment after five years.

Dexter, Osborne & Gillespie, for motion.

Hawes & Judge, opposed.

GILDERSLEEVE, J. On or about the 20th of May, 1884, in the District Court the petitioner herein, Harriott W. Armstrong and one Julian McAllister recovered a judgment for forty-four dollars and sixty-six cents against one Alfred Hopcraft and one George W. Hopping. Said judgment was docketed in the office of the county clerk of New York county on or about October 7, 1886. Thereafter the said Julian McAllister died, and Amelia H. McAllister was appointed the executrix of his estate, duly qualified as such, and is now the sole acting executrix of the estate of the said judgment creditor, Julian McAllister, deceased. The said Harriott W. Armstrong and the said Amelia H. McAllister, as such executrix, make this motion for leave to issue an execution on said judgment. The only one of the judgment debtors who has received notice of this motion is George W. Hopping. It appears from the affidavit of plaintiffs' attorney that an execution was issued under the District Court judgment by the marshal against the judgment debtor Hopcraft in May, 1884, and returned unsatisfied in June, 1884. In opposition to this motion the said Hopping swears that he never heard of Harriott W. Armstrong or of Julian McAllister, and was never served with summons, complaint or other process in any action in which they were plaintiffs. He admits that he was once in partnership with one Alfred Hopcraft, but dissolved partnership on or about April 1, 1884, about a month and a half before the entry of the judgment in the

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District Court above referred to. He further swears that no demand was ever made upon him for payment of this judgment, but says that he has no objection to an execution being issued against the property of the firm of Hopcraft & Co., although he strongly objects to any execution against himself individually. He swears that Hopcraft, upon the dissolution of the partnership in April, 1884, continued the business and assumed all the debts and liabilities. He says he has been in business in this city continuously for thirty years, and that petitioners could have found him before now, and are guilty of laches in making this motion. The transcript of judgment handed up with the papers indicates, on its face, that it was a judgment against the said Hopcraft and Hopping individually and not merely as copartners. The petitioners admit that execution has already been issued against Hopcraft, and now ask only that it be issued against Hopping. I am inclined to follow the authority of Lee v. Watkins, 3 Abb. Pr. 243, and hold that the court should not, on this application, go behind the judgment or inquire into its validity, and that the judgment debtor cannot here be heard to show that no summons was ever served upon him in the action. While the judgment remains on record, the court should go no further. If the statement of the defendant is true, he is not without his remedy. He can apply to have the judgment declared a nullity as against him, but I cannot entertain that application on this motion. As the judgment is now a valid and conclusive record, and as it has not been satisfied, the application of the plaintiffs to issue execution should be granted, without prejudice to the defendant to take any steps with regard to the judgment that he may be advised. Section 1933 of the Code provides that a judgment against joint debtors, as against a defendant not summoned, is evidence only of the extent of the plaintiff's demand after the liability of that defendant has been established by other proof. Section 1932 provides that where two or more defendants are jointly liable, and the summons is not served on all, the plaintiff may proceed against the one served, unless the court otherwise directs, and may enter judgment against all the defendants jointly indebted. Sections 1934, 1935 provide that the execution in such a case must issue in form against all the defendants, but the attorney for the judgment creditor must indorse thereon a direction to the sheriff containing the names of the defendants not summoned, and restricting the enforcement of

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the execution to the joint personal property of the defendants and to the real and personal property of the defendants who were summoned. In the case at bar, the plaintiffs will issue the execution at their risk and peril against the property of the defendant Hopping individually, but, as I have above stated, I do not think the court can go into that question at the present time. The judgment creditors, according to their attorney, obtained the judgment while they were copartners and upon a copartnership debt, and, although one of them has since died and been succeeded by an executrix on this application, I do not think the case of Thurston v. King, 1 Abb. Pr. 126, decided in 1854, applies. In that case the sole judgment creditor died, and the Special Term held that the executor could not issue execution, but should bring an original action on the judgment. See also Code, § 1376.

Motion granted.

FREDERICK L. COLWELL, Plaintiff, v. CHARLES A. TINKER, Defendant.

(Supreme Court, New York Special Term, June, 1901.)

Bankruptcy — Judgment for criminal conversation not discharged — Code C. P., § 1268.

A bankrupt, against whom a creditor named in the schedules had recovered a judgment in an action for criminal conversation had with the creditor's wife, is not discharged therefrom by his discharge in the bankruptcy proceedings, as such a judgment is recovered in an action "for willful and malicious injuries to the person or property of another" within the meaning of subd. 2 of § 17 of the Bankruptcy Act of 1898.

The bankrupt's motion to have the judgment discharged, made one year after his discharge in bankruptcy, must therefore be denied.

MOTION to vacate a judgment on the ground of a discharge in bankruptcy.

Nelson Smith, for motion.

Thomas McAdam, opposed.

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GILDERSLEEVE, J. On February 9, 1897, the plaintiff recovered a judgment against the defendant for $50,000 for criminal conversation with plaintiff's wife. The defendant here moves to have said judgment canceled and discharged of record. The defendant swears that he had no real estate at the time of the entry of the judgment and has not had any interest in real estate since such recovery, and that the judgment, therefore, is no lien upon any real estate. On the 13th of September, 1899, defendant filed a petition for adjudication in bankruptcy. The plaintiff objected to the discharge of defendant in bankruptcy on the ground that the only creditor of the bankrupt, as shown by the schedules, was the plaintiff, the owner of the aforesaid judgment, and that said judgment was recovered in an action involving the willful and malicious injury to the person or property of another, and, therefore, came under the exceptions enumerated in subdivision 2 of section 17 of the Bankruptcy Act, and was, in consequence, not a debt from which defendant could be discharged. The objections of plaintiff were duly considered and overruled by Judge Brown, on or about January 27, 1900, and, on February 2, 1900, an order of the District Court of the United States for this district was duly entered, discharging the defendant from all debts which existed on September 13, 1899, the date of the filing of the petition for adjudication in bankruptcy, "excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." Section 1268 of the Code provides that at any time after one year has elapsed since a bankrupt was discharged from his debts under the Bankruptcy Act he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, for an order directing the judgment to be canceled and discharged of record, and, if it appears that he has been discharged from the payment of that judgment or the debt upon which it was recovered, such order must be granted. Section 17, subdivision 2, of the Bankruptcy Act provides that the discharge shall not release the bankrupt from judgments in actions for willful and malicious injuries to the person or property of another. The plaintiff claims that the decision of Judge Brown overruling plaintiff's objections to the discharge of defendant does not render the question of defendant's discharge from the said judgment *res adjudicata,* for the reason that in his opinion the Federal judge stated that the discharge would be operative against other debts, whether enumerated

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or not, and that jurisdiction did exist, and that he declined to pass on the question whether the plaintiff's judgment herein was dischargeable or not. The opinion is not handed up on this motion, but this statement of the plaintiff's counsel appears to be conceded by his adversary, so I will accept it as true. The question, therefore, which I am here called upon to decide is whether an action for criminal conversation is one for "willful and malicious injuries to the person or property of another." It is, of course, not pretended that Tinker, in forming his culpable relations with Mrs. Colwell, was actuated merely by "a willful and malicious" desire to injure Colwell, nor, indeed, is there any positive reason for believing that such a motive played any part in the matter. It may well be said, however, that it was a "willful injury," as it was not done inadvertently. It was an injury to the person of Colwell, in the sense that his peace of mind and happiness were greatly damaged by the loss of his wife's affections. Code, § 3343, subd. 9. It was also an injury to the property of Colwell. A husband has a right to the services of his wife, while they live together and she is not engaged in a separate business, and he also has a right to her society and comfort. Tinker, by his seduction of Mrs. Colwell, has deprived Colwell of the services, comfort and society of his wife. We have, therefore, unquestionably, a willful injury to the person and property of another. But was that injury malicious? As I have above intimated, there is no proof of actual malice. But was there constructive malice? Malice has been defined as a disregard of social duty and of the rights of others. 98 Tenn. 48. The term malice, as applied to torts, such as criminal conversation, does not necessarily mean that which must proceed from a spiteful, malignant or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. As defined by Judge Brown in the case of United States v. Reed, 86 Fed. Repr. 309, "Malice consists in one's willful doing of an act, or willful neglect of a known obligation, which he knows is liable to injure another, regardless of the consequences; and a malignant spirit or a specific intention to hurt a particular individual is not an essential element." It seems to me that the judgment which defendant here seeks to have vacated was recovered in an action founded upon willful and malicious injuries to the person and property of another. It was, therefore, under the pro-

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visions of section 17, subdivision 2, of the Bankruptcy Act, not affected by defendant's discharge in bankruptcy. Motion denied, with ten dollars costs.

Motion denied, with ten dollars costs.

BRAYTON IVES, Plaintiff, *v.* GILBERT T. ELLIS et al., Defendants.

(Supreme Court, New York Special Term, June, 1901.)

Attachment — Plaintiff, when required to give further security under Code C. P., § 682 — Items recoverable — Laches.

Whether the court will direct an increase of the security theretofore given by the plaintiff to the defendants in order to procure a writ of attachment against their property, depends upon the question whether the action must be tried in order to get rid of the attachment.

Where, therefore, an attachment against non-resident defendants was not assailable and had not been assailed on any statutory ground and the defendants had succeeded in the action up to the Court of Appeals, the court at Special Term increased the amount of the plaintiff's original undertaking from $250 to $4,000 to cover the fees of counsel, sheriff and stenographer already incurred and fees to be incurred in defending the pending appeal to the Court of Appeals, the court considering that the trial and the eventual result of that appeal could alone decide the fate of the attachment — the parties having agreed that the existence of the attachment was not affected by the judgments in favor of the defendants.

Such a motion can be made at any time before the application of the attached property, or its proceeds, to the judgment recovered in the action.

MOTION to increase amount of undertaking on attachment.

James H. Fay, for motion.

Carter, Hughes & Dwight, opposed.

GILDERSLEEVE, J. The action is for a breach of warranty with regard to certain books sold by defendants to the plaintiff. The

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defendants are nonresidents, and plaintiff, upon concededly proper and sufficient affidavits, obtained an attachment, and attached some books belonging to the defendants. The action was tried and resulted in a verdict for the defendants. An appeal was taken and the Appellate Division affirmed the judgment. The plaintiff then appealed to the Court of Appeals, where the case now rests. No motion has been made by defendants to vacate the attachment, as the attachment was regularly granted upon statutory grounds, but defendants now move to increase the amount of the security given by plaintiff upon the attachment from $250 to $6,000, under the provisions of section 682 of the Code. The parties agree that the attachment exists in full force and effect at the present time, notwithstanding the judgment in favor of the defendants. The defendants claim that they have paid out $4,000, as counsel fees in the action, for sheriff's fees, for stenographer's fees upon the trial and for traveling expenses, and they also claim that they will sustain further damage to a considerable extent in defending the appeal now pending in the Court of Appeals. There is no question of laches here, as this application can be made at any time before the actual application of the attached property, or of the proceeds thereof, to the payment of the judgment recovered in the action. Code, § 682. The amount of the damage thus far is claimed to be $2,600 counsel fees, $313 sheriff's fees, $285 stenographer's fees and $500 traveling expenses. Inasmuch as a motion to vacate the attachment would necessarily fail, it is evident that the trial and the eventual result of the appeal can alone decide the fate of the attachment. In the case of Tyng v. American Surety Co., 48 App. Div. 242, on the question of allowing counsel fees incurred in the action as damages by reason of an attachment, Mr. Justice Patterson uses the following language, viz.: "The sole question before us relates to the expenses of the trial of the action being recoverable, and that depends altogether upon the absolute necessity of trying the action to get rid of the attachment." The case at bar would seem to meet this condition, and it also appears that the following words of the learned justice apply here, viz.: "It thereupon did become absolutely necessary for defendant to try the issues, in order to relieve the property from the attachment. It was that process which compelled defendant's appearance in the action. She was a non-

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resident, and, without the attachment, she would not have been brought within the jurisdiction of the court." And the appellate court held, in the case above quoted, that counsel fees incurred in the action "are damages which the defendant may sustain by reason of the attachment," within the meaning of the undertaking given to procure the attachment. Referring to the case of Northampton Bank v. Wylie, 52 Hun, 148, urged by the plaintiff in the case at bar, in opposition to this motion, Mr. Justice Patterson says: "It is not to be controverted that sureties on an undertaking given on procuring an attachment are not ordinarily liable for general counsel fees incurred in the action," but, under the state of facts above disclosed, he held that the authority of Northampton Nat. Bank v. Wylie did not apply. I must hold, under the above authority of Tyng v. American Surety Co., 48 App. Div. 240, that the $2,600 counsel fee must be considered as damages covered by the attachment bond. The same is true of the $285 stenographer's fees, as they are "expenses of the trial of the action," within the meaning of the language of Mr. Justice Patterson, above quoted. The security, to be given in an action by a plaintiff who obtains a warrant of attachment, is intended to be an indemnity to the defendant against his costs, disbursements and damages. Fuerstenberg v. American Soda Fountain Co., 21 App. Div. 501. The sheriff's fee of $313 is unquestionably covered by the bond. The claim of $500 for alleged traveling expenses, however, seems to be too hazy and indefinite to be here considered. I think substantial justice will be satisfied by raising the amount of the undertaking to $4,000. No costs.

Ordered accordingly.

CARRIE F. YOUNG, Plaintiff, *v.* MORRIS S. YOUNG, Defendant.

(Supreme Court, New York Special Term, June, 1901.)

Contempt — Alimony not discharged in bankruptcy — Poverty of defendant not an excuse for his failure to pay.

A discharge in bankruptcy does not discharge the bankrupt's liability to pay alimony, whether accrued at the time of filing the petition or accruing thereafter.

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A defendant who has refused to pay alimony awarded against him by a decree in an action for an absolute divorce cannot excuse the contempt by showing that his pecuniary circumstances are such that he cannot make the payments decreed to be made.

MOTION to punish for a contempt.

James, Schell & Elkus, for motion.

Louis Levy, opposed.

GILDERSLEEVE, J. In October, 1896, a judgment of absolute divorce in favor of the plaintiff was entered, which directed the payment of ten dollars a week alimony. Defendant paid the alimony until April, 1900, when he defaulted, and afterwards he moved to reduce the amount of the alimony. The motion was denied in August, 1900, and in October the plaintiff gave notice of a motion to punish him for contempt. Before the motion was argued, however, and on or about October 18, 1900, defendant, having become a voluntary bankrupt, obtained an order from the United States District Court, restraining plaintiff from taking any further proceedings against the defendant in this court until twelve months after the date of said order, or until the determination in the Federal court of the question of the discharge of the said defendant in bankruptcy, if he should apply for his discharge within the twelve months. The defendant applied for his discharge in the Federal Court, and the same was granted. On or about May 22, 1901, an order was entered in the United States District Court vacating the order of October 18, restraining plaintiff from proceeding against defendant for nonpayment of the alimony. Thereafter, and on May 24, 1901, plaintiff made demand for the alimony upon defendant, but the latter refuses to pay the same. Plaintiff, therefore, now makes this motion, under section 1773 of the Code, to punish defendant for contempt. There has been no sequestration of defendant's property or direction to give security, for the reason that satisfactory grounds are shown for believing that such measures would be ineffectual. So far as the discharge in bankruptcy is concerned, it has been held in this district of the Federal court that a discharge in bankruptcy does not discharge an obligation to pay alimony, even that which had accrued at the time of the filing of the petition in bankruptcy.

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See Matter of Shepard, 97 Fed. Repr. 187; Matter of Anderson, id. 321; Matter of Smith, 3 Am. Bank. Rep. 68. In the District Court of Kentucky, however, it was held that all alimony that had accrued at the date of filing the petition for adjudication in the bankruptcy proceedings was released by the discharge. Matter of Houston, 94 Fed. Repr. 119. I incline to follow the decision of the United States District Court in this district, and hold that neither the accrued nor the subsequent alimony was affected by the discharge in bankruptcy. The defendant has made no application for a reduction of the amount of the alimony since the one which he made last August, and which was denied. He claims here that he has only ten dollars a week to support himself and his fifteen-year-old daughter by his first wife. On the other hand, plaintiff claims that she is without means and that defendant is living in meretricious relations with a woman whom he supports in luxury. However that may be, this application cannot be answered by affidavits showing that defendant is unable to make the payments. To procure relief upon that ground, he can move to be released from imprisonment. Ryckman v. Ryckman, 34 Hun, 235. He cannot show in opposition to this motion to punish for contempt that his pecuniary circumstances are such as to render him unable to pay the moneys required to be paid. Strobridge v. Strobridge, 21 Hun, 288. The plaintiff appears to have followed the proceedings indicated by the statute, and I see no sufficient reason for denying this motion. Application granted.

Motion granted.

JAMES R. O'BEIRNE, Plaintiff, *v.* EDWARD I. MILLER, Defendant.

(Supreme Court, New York Special Term, June, 1901.)

Place of trial — Change for convenience of witnesses — Accessibility of court.

A motion to change the place of the trial of an action upon the ground of the convenience of the witnesses is addressed to the discretion of the court and will not be granted merely because the defendant swears to the greater number of necessary witnesses.

The relative accessibility, to all the witnesses, of the courts in which the plaintiff and the defendant respectively wish to try the case is a matter material for consideration.

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Motion for change of place of trial.

F. L. Eckerson, for motion.

George E. Waldo, opposed.

Gildersleeve, J. While the plaintiff was a candidate for Congress in the Richmond county district the defendant published in a Richmond county newspaper an alleged libel. The plaintiff brought this action for damages and laid the venue in New York county, of which county plaintiff is a resident. The defendant makes this motion to change the place of trial to Richmond county, where the cause of action arose, on the ground of convenience of witnesses. The defendant shows that he himself and eighteen witnesses by whom he hopes to establish his defense live in Richmond county. The plaintiff, on the other hand, shows that he himself and one of his witnesses live in New York and that another lives in Greenwich, Conn., and that it would be very inconvenient for them to go to the village of Richmond, Staten Island, where the Richmond County Court House is situated. He also seeks to show that, by reason of its comparative inaccessibility, the village of Richmond is less convenient, even to the majority of the defendant's witnesses, than is New York. He further claims that the testimony of some of defendant's eighteen witnesses will be merely cumulative and not essential to defendant at the trial. Still further does his counsel go in suggesting that a fairer trial could be had in New York than in Richmond by reason of the fact that the libel was published in that county and the vast majority of the readers of the libel live there. It is also suggested that the defendant enjoys considerable influence in Staten Island, and might be at an advantage before a jury of residents of Richmond county. However that may be, the main question for me to determine is the convenience of the witnesses as disclosed by the affidavits on this motion. The elaborate affidavit of plaintiff's witness Jesse C. Schenck, a real estate appraiser, makes out a strong case in support of the claim that New York is more accessible and convenient to a large majority of defendant's own witnesses, who live "along the northerly edge of Staten Island," than is Richmond, "an interior town, located in the central portion of the island and off the line of the steam railroad." This affidavit is corroborated by that

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of the plaintiff himself, who swears that he has traveled much through the county of Richmond. These allegations as to the relative accessibility of New York and Richmond for defendant's witnesses are apparently uncontradicted, and defendant seems to rest his claim as to the convenience of witnesses simply upon the fact that eighteen witnesses live in Richmond county. I am inclined to think, in view of the facts disclosed by the affidavits before me, that the ends of justice will be best promoted by denying this application for a change of venue. It is within the discretion of the court to grant or refuse applications of this kind, and, in the case at bar, I think a wise exercise of that discretionary power calls for a refusal. Motion denied. No costs.

Motion denied. No costs.

JOHN W. CLARK, Plaintiff, *v.* THOMAS A. ENNIS et al., Defendants.

(Supreme Court, New York Special Term, June, 1901.)

Examination before trial — Direction to produce books improper — Code C. P., § 870, et seq.

An order, requiring the defendants, stock brokers, to submit to an examination by the plaintiff, their customer, in order that he may prepare his complaint, cannot properly require the defendants to produce all their ledgers and books which bear upon the transactions had between the parties.

If, for the purpose of testifying, resort to the books is necessary, the defendants will be required to refer to the books for the purpose of giving the desired information.

MOTION to set aside an order for the examination of defendants and an inspection of their books in order to enable the plaintiff to frame his complaint.

Woods, Barnes, Deane & Callaghan, for motion.

E. B. Southworth, opposed.

GILDERSLEEVE, J. The defendants are stockbrokers and the plaintiff is their customer. The action is based on a stock trans-

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action or transactions, and plaintiff obtained an order to examine the defendants in order to frame his complaint. The defendants move to set aside the said order, which was granted *ex parte,* on the ground that "the papers upon which it was granted fail to show facts sufficient and necessary to bring the case within sections 870, 871, 872 and 873 of the Code, and that the plaintiff has failed to comply with the provisions and requirements of said sections." The allegations of the said papers seem to show a technical compliance with the requirements of the statute. The order, however, requires the production on the examination before the referee of all ledgers and books of defendants bearing upon the transactions between the plaintiff and defendants. The statute confines the examination of a defendant in an action to the purpose of eliciting information which will enable the plaintiff to frame his complaint or will be used on the trial, but the most that a plaintiff can claim before the service of the complaint is the right to examine the defendant, and it is improper for the order directing the examination of a defendant to direct the production of his books. If, for the purpose of testifying, resort to the books is necessary, the defendant will be required to refer to the books for the purpose of giving the desired information. See Green v. Carey, 81 Hun, 496. To that extent, therefore, the order is improper. So far as the merits of the application are concerned, the rule is that whenever it appears that the examination of an adversary is material and necessary, and the application is one not for the purpose of extracting evidence from him by unnecessary procedure, and when its good faith cannot be seriously questioned, it is almost a matter of course under the Code to direct the examination in the furtherance of justice. See Hardy v. Peters, 30 Hun, 80. I do not think, however, that it is necessary to go further into a discussion of the merits of the case, as the order must be vacated for the defect above pointed out. The motion is granted, without costs, and with leave to the plaintiff to make a new application for the examination of the defendants.

Motion granted, without costs, with leave to plaintiff to make a new application.

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CAROLINE GLASER, Plaintiff, *v.* WILLIAM E. SEITZ et al., Defendants.

(Supreme Court, New York Trial Term, June, 1901.)

Negligence — Explosion of a purchased seltzer water siphon.

The mere explosion of a siphon of seltzer water (manufactured by third parties), filled in the usual manner, with the usual liquids, and sold for seltzer water, cannot, without more, raise a presumption of negligence in the vendor sufficient to enable the vendee to recover of him for injuries received from the explosion, nor is a situation presented where the vendor can be held liable as for the sale of an article apparently harmless but really dangerous.

ACTION by plaintiff to recover damages for injuries received by the plaintiff in consequence of the explosion of a siphon of seltzer water purchased by the plaintiff from the defendants.

Black, Olcott, Gruber & Bonynge, for plaintiff.

Hayman & Rosenthal, for defendants.

MCADAM, J. Siphons of seltzer water, like the one that exploded, are in common use, and have been manufactured and sold in this city and elsewhere for many years. They are certainly in as common use as steam boilers and gas, and an explosion of a steam boiler or of gas does not necessarily create an inference of negligence sufficient to fix liability on the defendant. The plaintiff, even in such cases, must go further, and prove affirmatively the existence of some defect in construction or condition of the thing which contains the gas or steam of which the defendants were cognizant, or which they ought to have known by the exercise of proper care in the premises. There is no evidence in this case that the bottle, which was not manufactured but filled by the defendants, was not properly constructed, or that it was constructed differently from bottles in which seltzer water is usually sold. Nor is there any evidence that the manner of putting the water in was different from the method in common use, or that the

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character of the liquid was different from that usually put into such bottles. Gunpowder, dynamite, turpentine, gas, fireworks and many other explosives are used in the community as merchandise necessary in proper places and for certain purposes, and no one can contend that the sale of these commodities constitutes negligence on the part of the vendor when the articles are sold by their proper name indicating their character. There are cases in the books where articles have been sold as apparently harmless, and have turned out to be dangerous and inflicted damage, and the vendor has in consequence been held liable. For example, where naphtha, which is of an explosive character, was sold for oil, and injury resulted. There the defendant was held liable for the deceit. There is no pretense in this case that the siphon of seltzer water sold was misnamed, or that any deceit was practiced on the plaintiff. Indeed, it was an ordinary well-known article of merchandise, sold in large quantities every day. It is common knowledge that bottles containing seltzer or vichy water, or champagne or ginger ale, or cider, will sometimes explode, and that barrels containing cider may explode. But it does not necessarily follow that the vendor of these commodities in such bottles or barrels is liable for the explosion, in the absence of misconduct on his part, which misconduct must be affirmatively proved. For want of such proof the complaint must be dismissed.

Complaint dismissed.

BENJAMIN L. M. BATES, Plaintiff, *v.* FREDERICK HOLBROOK et al., Defendants.

(Supreme Court, New York Special Term, June, 1901.)

Municipal contractor — Liability to an individual.

Contractors with a municipality who are engaged on an important public work upon which it is necessary temporarily to use power, machinery, tools, and men are not liable in consequential damages to an individual, alleged to have been damaged thereby, unless it appears that the work has been negligently or unskillfully performed or that there has been an unreasonable encroachment upon private rights.

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Action for an injunction.

John Delahunty, for plaintiff.

James A. Dunn, for defendants.

Scott, J. The plaintiff is the lessee of a hotel on the northerly side of Union square in the city of New York. His lease expires in 1906. His premises have a frontage of 121 feet on Union square and 168 feet on Fourth avenue. The building is five stories in height, and contains some two hundred rooms, several restaurants, a café and bar. The park known as Union Square, as designated by law, extends to the northerly limit of the prolongation of the thoroughfare which, to the westward of Broadway and the eastward of Fourth avenue, is known as Seventeenth street. Laws 1832, chap. 89. So much of the Union Square as is laid out as a park is of oval shape, and so situated that there is in front of plaintiff's hotel a paved place, used as a thoroughfare for vehicles, and about 150 feet in width. Seventeenth street, east of Fourth avenue and west of Broadway, is sixty feet in width, the roadway being about forty feet wide. The defendants are the subcontractors for the construction of that portion of the so-called Rapid Transit Subway or tunnel which runs from the center of Great Jones street to the center of Twenty-third street. Under a permit from the park department, they have erected from the paved place in front of plaintiff's hotel the structure complained of in this action. They have inclosed with board fences a space 100 by 120 feet, in which they have erected buildings and placed boilers, forges and machinery to furnish power and appliances for the prosecution of the work under their contract. The inclosed space is also used as a storage place for tools and machinery, and as headquarters for the transaction of defendants' business. The structure is so erected as to leave in front of plaintiff's hotel a paved carriageway of the same width as is the carriageway of Seventeenth street east of Fourth avenue and west of Broadway. There is no doubt whatever that the erection and maintenance of the structures complained of have resulted, and will, during their continued maintenance, result in serious loss and damage to the plaintiff. The work upon which the defendants are engaged is an important pub-

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lic work, upon which it is necessary to use power, machinery, tools and men. It is a general rule that contractors with a municipality who are engaged upon such a work are not liable for consequential damages to a private individual, unless it appears that the work has been negligently, carelessly or unskillfully performed, or that private rights have been unreasonably encroached upon. Atwater v. Trustees, 124 N. Y. 602; Benner v. Atlantic Dredging Co., 134 id. 156; Lester v. Mayor, 29 N. Y. Supp. 1000; affd., 150 N. Y. 578. The evidence shows that the use of the public property by the defendants, of which the plaintiff complains, is merely temporary, being limited by the time necessary for the completion of the work upon which the defendants are engaged. Herein the case, as presented by the evidence, differs from the long line of authorities cited by the plaintiff, in which permanent structures, even if erected under authority of law, have been condemned when they have occupied lands appropriated to public use, or have injuriously affected private property. Laws 1891, chap. 4, § 24 (subd. 5), authorizes the use of public parks and squares for the exercise of such temporary privileges as the proper authorities may grant to facilitate the construction of the subway. That section by necessary implication conferred upon the proper authority power to grant the temporary privileges. The proper authority in the borough of Manhattan is the commissioner for that borough who, by section 612 of the Greater New York charter, is given the charge and management of the parks within his borough. No action by the park board was necessary to authorize the issue of a permit by him, because the Legislature itself had conferred power upon him. The testimony does not cause it to appear that the defendants' erection and use of the structure complained of has been unreasonable, or that they are conducting their operations negligently, unskillfully or carelessly. On the contrary, it appears that, considering the nature and extent of the work to be performed, and assuming that the erection and use of the structures are not contrary to law, the defendants are carrying on the work with as little resulting injury to private property as could reasonably be expected. It was attempted to be shown that the work could be conducted practically as well, and with less injury to this particular plaintiff, if the defendants' plant were placed elsewhere, or were subdivided into a number of smaller plants distributed along the line of the work.

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Undoubtedly this might be done, but it does not appear that the aggregate damage produced thereby would be lessened, but only that the loss which now falls upon the plaintiff would be cast upon others. The defendants are engaged upon a public work, under public authority. The necessity and proper place for the construction of the operating plant were matters to be determined by the contractor and the public authorities under whose supervision and direction the work was to be performed. There is no evidence that they have not acted in good faith, and consequently their exercise of discretion in those respects is not open to review. Atwater v. Trustees, *supra*. The plaintiff, although unquestionably injured, is not in my opinion entitled to either damages or an injunction.

The complaint must, therefore, be dismissed upon the merits, with costs.

Complaint dismissed, with costs.

JANE REMSON et al., Plaintiffs, *v.* ROSALIE HYAMS, Individually and as Executrix, Etc., Defendant.

(Supreme Court, New York Trial Term, June, 1901.)

Ejectment — Words reserving an alley — Remedy in equity.

Where deeds of partition made by tenants in common reserve an alleyway by metes and bounds and reserve to the grantee and his heirs the sole and exclusive enjoyment thereof, a subsequent grantee thereof may maintain an action against owners of the adjoining lot, out of which the alleyway was reserved and taken, to recover possession of it.

The objection that only an easement was granted by the words of the deeds and that the remedy, therefore, is in equity comes too late when made at the close of the trial of the action in ejectment.

ACTION by plaintiffs to recover possession of an alleyway.

Wilder & Anderson, for plaintiffs.

Charles W. Coleman, for defendant.

SCOTT, J. It may be said to be undisputed that the plaintiffs are entitled to recover possession of the alleyway, which is the

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subject of this action. The principal objection urged against a recovery is that they have a mere easement, and that for the protection of such a right a possessory action may not be maintained at law, but an action in equity should be instituted. What the plaintiffs are entitled to is not the mere right to pass and repass over a strip of land, but the sole and exclusive use and enjoyment thereof. Reading together the deeds by which Abraham Remson and James Ackerman, then tenants in common of both lots, undertook to make partition between themselves, it appears that Ackerman conveyed to Remson the fee of the strip of land in dispute, reserving to himself the easement or privilege of erecting a building not upon, but over it, commencing at a point nine feet above the surface of the ground. Ackerman's deed conveyed to Remson in absolute terms, not only the corner lot by metes and bounds, but also the alley or passage-way. The absolute words of conveyance are attributed to the alleyway precisely as they are to the corner lot, and it is described as "on" the westerly side of the corner lot, and "out of" the easterly side of the adjoining lot. And not only is this strip or alleyway thus included within and covered by the words of absolute conveyance, but the deed declares that the alley or passage-way is to be forever kept open for the sole and exclusive use and enjoyment of Remson and his heirs and assigns, a provision which accords precisely with an intention to convey the fee to him, but is not so apparently in accord with an intention to grant merely a right of way over land, the title to which still remained in the grantor. As to the corner lot described in the deed by metes and bounds there were no reservations of any servitude. As to the alleyway there were such reservations, and they serve to account in some measure for the device adopted of describing the corner lot and the alleyway separately. These reservations were for the use of a watercourse running along the alleyway; the right to keep the windows open on the easterly side of the house No. 4 Watts street; the right to erect, in a certain contingency, cast-iron pillars of a designated size for the support of a brick wall or gable end over the easterly side of the alley, and the privilege of maintaining a tin leader to conduct water from the front roof of No. 4 into a cistern in the yard. Everything contained in this deed is consistent with the construction contended for by the plaintiffs that the fee of the alleyway was in-

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tended to pass to Remson, subject to certain restrictions as to its use, and to certain rights or privileges over it in behalf of the adjoining property. The deed of conveyance of No. 4 Watts street made by Remson to Ackerman at the same time and in furtherance of the common purpose of partitioning the property confirms this construction. It certainly does, in the first instance, convey by metes and bounds a lot of land which included the alleyway now in dispute. As to another alleyway it conveyed a right to pass and repass, thus creating obviously merely an easement, but as to the alleyway now under consideration it is excepted and reserved out of the lot described by metes and bounds, and it is declared that it is forever thereafter to be open for the sole and exclusive use and enjoyment of Remson, the grantor, his heirs and assigns, subject, nevertheless, to the same rights and easements in favor of the owner of the lot No. 4 as are reserved to him in Ackerman's deed to Remson. Even if the plaintiffs' right was merely that of possession and use, and not of title they should not be relegated to another action. The complaint demands possession of the alleyway and damages for having been deprived of its use. To this they are, in any event, entitled. The damages have been assessed by a jury, and the question as to the judgment to be entered, has been, by consent of the parties, reserved by the court. Neither by the answer nor upon the trial, except at the very end of the case, was the objection taken that an action at law would not lie, but that resort should have been had to the equitable side of the court. The objection came too late. Wright v. Wright, 54 N. Y. 437; King v. Van Vleck, 109 id. 363; White v. White, 20 App. Div. 560.

The plaintiffs are entitled to a judgment awarding them the possession of the alleyway for the sole and exclusive use and enjoyment of themselves, their heirs and assigns, subject to the rights or easements reserved in favor of the owner of No. 4 Watts street, and for the damages accrued to the time of trial as found by the jury, with costs.

Judgment for plaintiffs, with costs.

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SAMUEL MORROW, Plaintiff, *v.* MARY McMAHON et al., Defendants.

(Supreme Court, New York Special Term, June, 1901.)

Will — "Lawful issue" used in two senses in the same will — Defeasible remainder — Presumption of death.

The will of a testator, who had a living sister, Eliza, and who had had five other brothers and sisters, who had died before him, gave one-third of the income of his residuary estate to his wife during her life, and of the remaining two-thirds he gave during the life of his wife one-sixth to Eliza, and the remaining five-sixths to the "lawful issue" of his deceased brothers and sisters *per stirpes*. In case of the death of Eliza and that of all of the lawful issue of his deceased brothers and sisters, the share of the income of the person dying was to be divided among the remaining beneficiaries. As to the *corpus*, he directed that the trust should cease on the death of his wife, and that then the residue be divided between Eliza, if living, and the "lawful issue" of his deceased brothers and sisters, then living, *per stirpes*, "their heirs and assigns forever." If Eliza died before the termination of the trust her share was to be divided among the remaining beneficiaries. If all the issue of any one of the deceased brothers and sisters died before the termination of the trust, the share of the issue dying was to be divided among the surviving beneficiaries. Eliza died before the testator and the widow is still living.

Held, that, in the provision as to income, the testator meant by "lawful issue" children, and that, in the provision as to the *corpus*, he meant by "lawful issue" descendants.

That there was no inconsistency in interpreting the same word in the same will in different senses.

That the residue vested, in the issue of the deceased brothers and sisters, a present estate defeasible by death before the termination of the trust.

In 1873 a husband, who was on good terms with his wife, left her to better his condition, and wrote to her frequently until 1876, when he stated that he was in a hospital which he never expected to leave.

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He was never heard from thereafter, although his wife had in the meantime born to him a child which he had never seen.

Held, that he would be presumed to have died in seven years after 1876.

ACTION for the construction of a will.

W. H. Osborne, for plaintiff.

F. V. Dobbins and Joseph Garrison, for defendants.

GILDERSLEEVE, J. The object of this suit is to procure a judicial construction of the will of William McMahon, and an accounting by the trustees of the income derived from the estate.

The testator died in October, 1898, leaving a will, which has been admitted to probate, and by which, after certain bequests, he gave the rest of his estate to his executors, in trust, to receive the income thereof during the life of his wife, Mary McMahon, and apply the net income as follows; to pay one-third thereof to his widow for her life, divide the remaining two-thirds into six equal parts, and pay one-sixth thereof to his sister, Eliza Thompson, and one-sixth to the "lawful issue" of each of his deceased brothers John and Samuel, and his deceased sisters, Ann Morrow, Maggie England, and Caroline May, *per stirpes*.

In case of the death of the testator's sister Eliza, or of *all* the lawful issue of any of his deceased brothers and sisters above named, the share of the person or persons so dying, was to become a part of the net income and be divided among all the remaining beneficiaries of the will, viz.: Eliza, and the lawful issue of his deceased brothers and sisters, in the same proportions.

Upon the death of the testator's wife, the trust was to cease, and he then gave and devised all the residue of his estate to his sister Eliza, if then living, and to the "lawful issue" of his deceased brothers and sisters, above named, then living, *per stirpes*, "their heirs and assigns forever."

In case his sister Eliza should die before the termination of the trust, her share was to be divided among the surviving beneficiaries (the same as named above), in like proportions as the principal devise and the testator so gave and devised the same.

In case of the death of *all* the issue of any of the testator's

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deceased brothers and sisters (above named), before the termination of the trust, the share which such issue would have taken was to be divided among the surviving beneficiaries in like proportions as the principal devise, and he so gave and devised the same. This states the substance of the will in question.

The testator's widow is still living. His sister, Eliza Thompson, died before the testator, though on the same day. So that all the other brothers and sisters of the testator having died before he made his will, there were left at his death only the children of his brothers and sisters and their descendants.

The plaintiff is the son of James Morrow and the grandson of Ann Morrow, a sister of the testator. He claims that his father is dead; that he is of the "lawful issue" of the testator's sister, Ann Morrow, and, therefore, entitled to share in the income of the estate now, and, at the death of the testator's widow, in the residue of the estate, if he shall then be living.

The claim that James Morrow, plaintiff's father, is dead, rests, not on proof of his actual death, but on the presumption of his death arising from the fact that he has not been heard of, or from, since the year 1876. The evidence shows that James Morrow was born about the year 1850, and married plaintiff's mother February 2, 1872, and that on November 12, 1872, nine months after the marriage, he went to Illinois, with the avowed purpose of seeking employment and making a home for his wife. At that time his wife was with child by him, and on May 20, 1873, gave birth to the plaintiff. Before James Morrow left his wife, he lived with her in peace and love, and was on friendly terms with his relations. When he left his wife, November 12, 1872, their parting was affectionate, and he wrote to her, weekly, for three years. Then ensued an interval of a year during which his letters ceased.

In 1876, Morrow wrote to his wife, stating that he was then in a hospital, in Texas; has been there six months, never expected to leave it, and asked her forgiveness for past wrongs. Before his departure from Newark, New Jersey, where he lived after his marriage, he was afflicted with inflammatory rheumatism. He is not shown to have died, but after further efforts, by means of correspondence, to ascertain whether he was alive or dead, his family and relatives have not heard of, or from him, since 1876, a period of twenty-four years.

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Considering that Morrow was, as testified on the trial, of a restless disposition and roving habit of life, and probably adventurous in spirit; that he was a victim of inflammatory rheumatism; that he lived happily with his wife and parted with her in a loving manner with the purpose of bettering his situation in life for himself, his wife and his expected child; that he continued to correspond with his wife for three years, writing her every week, the evidence, in the absence of any countervailing testimony, leaves the impression on my mind that the man is dead. Another influential fact in the case, is that Morrow left his wife enciente with his and her first child; and this circumstance, always full of interest to parents, must be allowed great weight, in a case like this, in determining whether the absent father is alive or not. For, on the hypothesis that he is living, after twenty-four years of silence and continued absence, his conduct towards his wife and child can be accounted for only by assuming that he is destitute of natural affection for his offspring, however indifferent he might feel towards his wife.

This argues a condition of mind and heart, which, happily, is found only in natures from which the highest instincts of our humanity have been obliterated. The law presumes better things of men, and the plaintiff is entitled to whatever benefit the humane presumptions of the law in favor of the existence of goodness, rather than evil, in men, affords him.

Of course, in every case of this kind the question here presented must be determined largely on its peculiar facts and circumstances. I, therefore, conclude that James Morrow is dead, and that, in accordance with the legal presumption, he died seven years after he was last heard from, in the year 1876.

The next question to be considered, is whether the word "issue," in the fourth clause of the will, disposing of the income of the estate, was used by the testator in the sense of descendants *ad infinitum*, or in the sense of children, and, therefore, limited to the children of the testator's deceased brothers and sisters. The primary meaning of issue is descendants to the latest generation. But, where the testator appears to have used it in a restricted sense, it will be held to mean children. I think that, as applied to the income, it was used by the testator in the sense of children, meaning thereby the immediate children of his brothers and sisters, who were living at the time of his death,

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when the will became operative. The scheme of that part of the will seems to have been to provide for those children only. All the testator's brothers and sisters had died before he made his will, and the children they left were, presumably, known to him. And having no children of his own to provide for, he was probably interested in them and their present welfare during the life of his wife.

The testator's sister Eliza, having died before his death, the provisions of the will regarding the disposition of the income may be stated thus: The testator gave the income to the "lawful issue" of his brothers and sisters, and directed that if all the "lawful issue" of any brother or sister should die, their share should go to the remaining beneficiaries. Now, bearing in mind the familiar principle that, as respects the persons who were to share in the distribution of the income during the life of the testator's wife, the will speaks as of the time of the testator's death, and that they were to be ascertained, then, if, for "lawful issue," we read children, the fourth clause is consistent and free from difficulty; for, the testator might reasonably have contemplated the possibility that all the children of *some* of his brothers and sisters would die before his decease, and he would naturally direct that the share of those so dying should go to the surviving children. But, on the assumption that the words "lawful issue," were used in their technical sense as meaning the descendants of the testator's brothers and sisters, we are met by this difficulty, namely: having given the income of his estate to the "lawful issue" of his brothers and sisters, and directed that if *all* the "lawful issue," that is, their descendants, lineal and collateral, to the remotest degree, should die, in other words, become extinct during his life, their share should go to the "lawful issue" or descendants surviving them, he must have contemplated the possible failure of all such issue before his own death.

This would be wholly at variance with all human calculations respecting the duration of life, and too unreasonable, therefore, to be accepted as the probable intention of the testator.

If it be said that the testator had in mind the possibility of the death of all the "lawful issue" of any *one* brother or sister, only, the answer is, that if he could reasonably contemplate the death of all the issue of *one* brother or sister, he could as rea-

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sonably and naturally have contemplated the death of all the "lawful issue" of *all* his brothers and sisters.

Indeed, by reasonable construction, the expression "lawful issue" of any brother or sister, would include *all* the "lawful issue" of *all* his brothers and sisters. That the testator entertained a possibility so utterly remote and unreasonable, is incredible.

I think it beyond all question that the testator intended to confine the benefit of the income to those children of his brothers and sisters who should be alive at the time of his death, and the survivors of them, up to the death of his wife, *per stirpes*. The testator's sister Eliza, pre-deceased him, and the proviso thus became operative. Besides, there being no word of gift and only a direction to pay, the bequest was to a class which was to be ascertained at the time of the testator's death, and they must be the children of his brothers and sisters then living. Matter of Allen, 151 N. Y. 243; Matter of Brown, 154 id. 313.

The fifth clause of the will presents another and a different question. The will, as respects the final disposition of the residue of the estate, must be construed as regards the words "lawful issue," in the primary sense of issue, as including all descendants of the testator's brothers and sisters, indefinitely. The testator's wife being then dead, and he having no children, it must be assumed that he intended to make a final and complete disposition of his entire estate; and, having in mind the possible death, during the life of his widow, of some of the immediate children of his deceased brothers and sisters, leaving issue, he would naturally provide for that contingency, by giving his estate the direction which it would take if he should die intestate, viz.: go to his heirs-at-law, the descendants of his brothers and sisters.

Hence, he used the words, "lawful issue," in their larger and technical sense, and to give emphasis to his intention, he added the words "heirs and assigns," which are not used in connection with his disposition of the income of the estate, and which, I think, should be construed to include the descendants of the nephews and nieces of the testator. 2 Redf. Wills, 65; Lemacks v. Glover, 1 Rich. Eq. 141.

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There is no inconsistency in interpreting the same word in the same will, in different senses. 2 Redf. Wills, 65; § 18, n. 29.

This construction on the will, prevents the disinheritance of the testator's heirs-at-law, which it is the policy of the law to avoid, when possible without doing violence to the manifest intent of the testator (Hersee v. Simpson, 154 N. Y. 496), and is the one which I think expresses the mind of the testator as gathered from the whole will.

The disposition of the residue of the estate being accompanied with apt words of gift and devise, gave the beneficiaries a vested and not a contingent interest. The rule of law is that the court will always so construe a devise, where it can be done consistently, with the intention of the testator. Matter of Seaman, 147 N. Y. 69; Hersee v. Simpson (*supra*).

It must be held, therefore, that the devise of the residue of the estate vested in the issue of the deceased brothers and sisters of the testator a present estate defeasible by their death before the termination of the trust.

This seems to be a case which the court should entertain and direct an accounting by the trustees to be taken therein. Wager v. Wager, 89 N. Y. 161; Mellen v. Mellen, 139 id. 210.

Let findings and judgment in accordance with these views be submitted for settlement on notice.

Judgment accordingly.

JOHN GROH, Plaintiff, *v.* SUSIE O. GROH, Defendant.

(Supreme Court, New York Special Term, June, 1901.)

Divorce — Motion to vacate judgment after death of plaintiff — Remedy.

Where the plaintiff in an action for absolute divorce dies after judgment has been rendered in his favor, the defendant cannot move, in the action, to vacate the judgment on the ground that it was improperly obtained.

To that end she must bring a separate action against all the heirs and other persons interested in the plaintiff's real estate, grantees thereof subsequent to the judgment, and his personal representatives.

MOTION to vacate a judgment of divorce.

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A. G. Fox, for motion.

S. Untermyer, opposed.

GILDERSLEEVE, J. The plaintiff, John Groh, obtained a judgment of absolute divorce against the defendant, Susie O. Groh, in February, 1899. In March, 1900, the plaintiff died. The defendant now, after the lapse of more than a year from the death of plaintiff, makes a motion to set aside the judgment of divorce on the ground that said judgment was improperly obtained. I do not think this is the proper method of procedure. It seems to me, upon the authority of Watson v. Watson, 1 Hun, 267, that a separate action should have been brought against all the heirs and other persons interested in the real estate left by the plaintiff and such persons as may have taken conveyance thereof subsequent to the decree of divorce, as well as against the representatives of the deceased plaintiff. Motion denied, without costs and without prejudice.

Motion denied, without costs and without prejudice.

BYRON CHATFIELD, as Supervisor of the Town of Elbridge, Plaintiff, *v.* PRICE CAMPBELL et al., Defendants.

(Supreme Court, Onondaga Special Term, June, 1901.)

Town — The lien created by filing a collector's bond may be foreclosed in equity — Principal and surety — When administrators may defend as to land — L. 1890, ch. 569, §§ 52, 53, 66.

The statutory lien imposed by the Town Law upon the real estate of a town collector, and that of his sureties, by the due filing of his undertaking of office may, upon his default in failing to pay over tax moneys which he has collected, be foreclosed in equity by the town supervisor, as the remedy at law is not adequate.

The inadequacy of the remedy at law considered.

Where the collector deposited the tax moneys, now in default, with an insolvent banking firm of which one of his sureties, since deceased, was a partner, and these moneys passed into the firm assets and from thence into the hands of the general assignee of the firm and

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there remained, the court considered that the lands of the banker should be sold first in the action as he, or his estate, had become in equity the principal debtor to the town; and it further held that the town supervisor was entitled to payment before the other general creditors of the deceased surety, even if the latter's estate were insolvent.

Where the complaint in the action alleges that the administrators of the deceased surety have or claim to have some interest in the premises which accrued subsequently to the lien of the undertaking, the administrators are entitled to defend upon the ground that the plaintiff has on the facts an adequate remedy at law. If the surety's personal estate were insolvent and the administrators had taken proceedings to sell his real estate to pay his debts, they would be necessary parties to the action.

ACTION by a town supervisor to foreclose under a town collector's bond.

Hiscock, Doheny, Williams & Cowie, for plaintiff.

Baldwin & Magee, for defendants Campbell and Post.

Homer & Waldo Weston, for defendants Rodger and Lewis, as Administrators, etc.

ANDREWS, W. S., J. Every person elected or appointed collector of a town in this State is required to execute an undertaking, with two or more sureties, to the effect that he will well and faithfully execute the duties of his office, and deliver it to the supervisor. The supervisor shall file the undertaking in the office of the county clerk, who shall make an entry thereof in a book to be provided for that purpose, in the same manner as judgments are entered of record; "and every such undertaking shall be a lien on all the real estate held jointly or severally by the collector, or his sureties, within the county at the time of the filing thereof, and shall continue to be such lien, until its condition, together with all costs and charges which may accrue by the prosecution thereof, shall be fully satisfied." The parties executing this undertaking are jointly and severally liable for the damages caused to any person or party by reason of a breach of its terms. Town Law (L. 1890, ch. 569), §§ 52, 53, 66.

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If a collector shall neglect or refuse to pay over the moneys collected by him to any of the persons to whom he is required to pay the same by his warrant, or to account for the same as unpaid, the county court, on proof of such fact by affidavit, shall make an order directed to the sheriff of the county commanding him to levy such sum as shall remain unpaid by the collector out of his property. The sheriff shall cause such warrant to be executed, and if he fails to obtain the entire amount due, he shall so state in his return, and the county treasurer shall give notice to the supervisor of this fact. The supervisor shall forthwith cause the undertaking of the collector to be prosecuted and shall be entitled to recover thereon the sum due from the collector, with the costs of the action. Tax Law (L. 1896, ch. 908), §§ 260, 262.

It appears that in the fall of 1897, Price Campbell was chosen collector of the town of Elbridge. One William C. Rodger, since deceased, and Robert E. Green conducted a banking business in that town under the firm name of Rodger & Co. On or about December 15, 1897, the collector's official bond was executed by Campbell, Rodger and the defendants, Laird and Post. At this time the bank was insolvent.

Between December 20, 1897, and January 2, 1898, Campbell, as collector, deposited in Rodger & Co.'s bank $800 of tax moneys. On January second Rodger died, and the defendants Lewis and C. Julia Rodger were subsequently appointed administrators of his estate. The banking business was continued by Green as surviving partner until January 7, 1898, when he made a general assignment for the benefit of his creditors. Between January second and January fourth, Campbell deposited $575 of tax money in addition to his prior deposits. No part of these deposits has been repaid, and they are still due from Campbell to the town. Subsequently the proper steps were taken and the sheriff was directed to levy out of the property, personal and real, of Price Campbell, the sum of $1,375. The sheriff made a return stating that he could find no property on which to make such levy. The county treasurer thereupon notified the supervisor and this action was begun.

The complaint alleges substantially all the facts that have been stated; describes certain pieces of property situated within the county which belonged severally, at the time the bond was filed,

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to Rodger, Laird and Post; alleges that the administrators and various other defendants, who are the heirs-at-law of William C. Rodger, have or claim to have "some interest in or lien upon the premises above described, or some part thereof, which interest, or lien, if any, accrued subsequently to the lien of said bond," and demands judgment of foreclosure and sale of the premises in the usual form to satisfy the amount due on the bond. It further asks that the lands of William C. Rodger be first sold on the ground that, under the circumstances, he, in equity, is primarily liable to make good the amount due, and that the defendants, Campbell, Post and Laird, be adjudged to pay any deficiency.

The defendants, Campbell and Post, answer, also claiming that the lands of Rodger should be first sold.

The defendants, C. Julia Rodger and Alfred D. Lewis, as administrators, answer and allege that the plaintiff ought not to maintain this action in equity for the reason that the facts pleaded disclose an adequate remedy at law; they then deny on information and belief each and every allegation in the complaint, except some formal matters, and submit their rights to the court.

The other defendants have not appeared.

At the close of the plaintiff's evidence the same defendants again raised the question as to whether or not the plaintiff had an adequate remedy at law, and moved to dismiss the complaint upon this ground. This motion was formally denied and they then, without offering any evidence, rested.

It is suggested by the plaintiff, and by the defendants Post and Campbell that the administrators had no standing in court upon this question. They have no title as administrators to, or interest in the real property sought to be foreclosed, and no personal claim is made against them for deficiency or otherwise. The title of Mr. Rodger's real estate vested, upon his death, in his heirs. They do not defend.

One difficulty of this proposition is that the complaint alleges the administrators "have or claim to have some interest in the real estate." This may easily be true. If, for instance, Mr. Rodger's personal estate were insolvent and they had begun a proceeding in Surrogate's Court to sell his real estate for the payment of debts, I assume that they would be necessary parties to this action. Wiltsie Mort. Forec., § 145.

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The more serious preliminary question is whether, under the circumstances disclosed, an action in equity can be maintained for the foreclosure of this lien.

It must be conceded at the outset that the lien created by the Town Law is a purely statutory one and that there is no remedy provided in the statute itself for its enforcement. It must also be conceded that if the plaintiff had a complete and adequate remedy at law he is bound to resort to that remedy.

Starting with these premises the defendants assert that a court of equity has no jurisdiction. The statute defines the relief to which the plaintiff is entitled and it is an entirely adequate one. He may sue those joining in the bond as for a debt and then their property can be sold on execution.

In support of these propositions, and as a case in point, the defendants cite Upham *v.* Paddock, 13 Hun, 571. The only question decided in this case was that the plaintiff was not entitled, by virtue of the lien created by the filing of a collector's bond, to the rents and profits of the land on which the bond was a lien which had been actually collected by the owner thereof. In his discussion, however, the learned justice writing the opinion spoke of the nature of such a lien as the present. It was not a lien by mortgage, he said, but it was created by statute and was more nearly analogous to a lien by judgment. The statute provides, he says further, no special mode of enforcing the lien. "The only mode, therefore, is by a suit on the bond to recover the amount due from the collector, and judment being obtained, the real estate which is subject to the lien may be sold by the sheriff upon execution."

It is with great hesitation that I fail to follow this intimation, but it seems to be opposed to the great weight of authority. In fact, it seems to be the rule that except in the case of those common-law liens, which simply give the right to the possession of certain property until some debt or demand due to the person retaining it is satisfied (and many, if not all of these, now seem to be provided for by section 1737 of the Code of Civil Procedure); except in the case of judgment liens which can be enforced directly by a sale of the property, and except in cases of those other statutory liens where the remedy to be pursued is pointed out by statute itself and is exclusive, a party who has a lien or charge on property may always come into a court of equity

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and enforce his rights, either by a judicial sale of the property itself and a distribution of its proceeds, or by means of sequestration of the property and an appropriation of its rents and income until the lien is satisfied. 3 Pom. Eq. Juris., § 1233; Howe Machine Co. v. Miner, 28 Kan. 441; Fletcher v. Morey, 2 Story, 555; Gilchrist v. Helena H. S. & S. R. Co., 58 Fed. Rep. 708; Hovey *v.* Elliott, 118 N. Y. 124.

In the article on liens in the Encyclopedia of Pleading & Practice it is stated that "As a general rule liens are enforcible in equity unless another mode of enforcement is provided by law, except in the case of liens accompanied by possession which as a rule cannot be actively enforced in the absence of a statutory remedy. Statutory liens are enforcible in equity when the statute provides no method of enforcement."

So in Jones on Liens at section 94, it is said that the foreclosure of a lien is either a statutory or an equitable proceeding. At law there is no remedy beyond retaining possession.

In Wilder v. Butterfield, 50 How. Pr. 385, an action similar to the present seems to have been sustained. There a judgment was allowed declaring a lien upon all the real estate in the county of Jefferson belonging to the obligors; providing that all must be sold under such judgment if needs be to meet any deficiency, and ordering a reference to ascertain specifically what real estate was held by the several obligors.

So in Crisfield v. Murdock, 127 N. Y. 315, an action of the same character as that at bar was brought. An objection was made upon the trial that the plaintiff had an adequate remedy at law, but this question was neither discussed nor decided either by the General Term or by the Court of Appeals.

The proposition which seems to be maintained, at least impliedly, in the cases which have been cited is also the one that in reason should prevail. The statute creates a lien upon all the real property owned by the sureties at the time the bond is filed. What adequate remedy at law is there for the protection and enforcement of this lien? The party for whose benefit it is created clearly cannot take possession. If the sureties are sued on their joint and several obligation and a money judgment obtained against them this judgment becomes a lien upon the property owned by them at the time it is docketed. If they had parted subsequently to the filing of the bond with any of their

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real estate; if other judgments had been obtained against them, or other liens created, such transfers, or judgments or liens would take precedence of the judgment lien. If the sureties had no personal estate out of which the judgment could be collected by execution, a second action might, in many cases, be necessary to enable the plaintiff to collect the amount due and to enforce the statutory lien existing in its favor.

I am, therefore, of the opinion, that the objection as to the form of the action must be overruled.

The remaining question to be considered arises upon the claim that payment should be enforced, in the first instance, from the real estate that belonged to Mr. Rodger.

As has been seen Rodger & Co. was insolvent on December twentieth. Between that time and January second, $800 was deposited in the bank by Campbell. On the last-named day Rodger died. On the third and fourth, $575 more was deposited. On the seventh Green made the general assignment. No part of these deposits has ever been repaid. In the bank Mr. Rodger had a two-thirds interest. Green was insolvent.

The result is, therefore, that Rodger & Co. received and retained $1,375 which is applicable to the payment of the firm debts. By so much the personal estate of Mr. Rodger is relieved of claims for which it would otherwise be liable. This is as much so of the deposits made after his death, as of those made prior thereto. It may be true that this event dissolved the firm. It may be true that thereafter Green had no right to receive deposits and his act in so doing would not bind the Rodger estate. But when he did receive them and did turn them over to the assignee without objection from anyone, the latter held them as an asset of the estate and the total claims against it will be by so much decreased.

As is said in Wilder v. Butterfield cited above, the collector is, on the face of the bond, the principal debtor. If he fails to pay his sureties are liable, and if one of them should make the payment he would be entitled to call upon the other for contribution. But here the facts lead to a different result. If Rodger were alive and paid this $1,375 to the plaintiff he could not call upon the collector, nor any one of the other sureties to indemnify him in whole or in part. The fact that he had received the taxes and benefited by them would be a sufficient answer to such a

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claim. The fact that his firm appropriated the taxes and that the result of such an appropriation was to benefit Rodger, or his estate, makes him in equity the principal debtor.

It would be equally so if the payment were involuntary. If his land had been sold under a decree of the court, to make good the deficiency, he could not complain. Again as between these parties he is bound to make good the loss.

As against Rodger, therefore, Campbell and his cosureties would have been entitled to a decree that the lien of the bond be enforced against his real estate. Assuming, however, that his estate is insolvent, and his general creditors need to resort for satisfaction of their claims to his real estate (and it is only on this supposition that the administrators have any interest in the result of this case) have these creditors any equities in the matter which would lead to a different result?

Crisfield v. Murdock, already cited, is, I think, conclusive on this point. If a mortgagee having a specific lien acquired after the bond was filed cannot be heard on this subject, surely a general creditor cannot. And in the case mentioned the mortgagee was also a creditor.

I am, therefore, of the opinion that the plaintiff is entitled to the relief demanded in the complaint.

Proper findings may be prepared. If they are not agreed upon they may be settled on proper notice.

Ordered accordingly.

Matter of the Judicial Settlement of the Account of ANNA C. BROWNE, as Administratrix, etc., of ROBERT W. BROWNE, Deceased.

(Surrogate's Court, Kings County, June, 1901.)

Judgment — Status of one recovered in the lifetime of an intestate — Principal and surety — Joint debtors — Code C. P., §§ 1822, 2718; 1942–1944.

A judgment docketed against an intestate in his lifetime cannot be rejected and referred under the statute as it is a debt which has been established by a court of competent jurisdiction.

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In such case the surrogate must determine to whom the judgment is payable, the sum to be paid, and, among other things whether it has been paid.

The relation of principal and surety exists between an owner of real property, personally liable on a bond secured by mortgage upon the property, and his grantee who assumes payment of the mortgage, and consequently where the assignee of a deficiency judgment recovered upon the foreclosure of the mortgage is paid that judgment by such a grantee and satisfies it, the assignee cannot again recover its amount of the grantor, since deceased and a judgment-debtor in the same judgment, provided the said assignee had notice of the existence of the relation of principal and surety.

Such a satisfaction is not a compromise of a joint obligation within Code C. P., §§ 1942–1944, as the obligation is not joint.

PROCEEDINGS upon the judicial settlement of the accounts of an administratrix.

James Demarest, for administratrix.

Walter F. Lewis, for claimant Drummond.

Isaac P. Hubbard, special guardian.

ABBOTT, S. This court has already decided that a judgment recorded against an intestate in his lifetime is not a claim which may be rejected and referred within the contemplation of sections 1822 and 2718 of the Code of Civil Procedure. It is a debt the validity of which has been established by a "court of competent jurisdiction". § 2743; McNulty v. Hurd, 72 N. Y. 518. The validity of the debt having been established, it is the duty of this court to determine "to whom it is payable, the sum to be paid by reason thereof and all other questions concerning the same." § 2743.

Among the questions which may be so determined is whether or not payments have been made on account of the judgment and the balance remaining due thereon, if any. McNulty v. Hurd, *supra*.

Only questions of law are presented; the facts are undisputed.

Prior to June 28, 1869, one William Prodgers and wife exe-

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cuted to the Equitable Life Assurance Society a bond and mortgage to secure the payment of the principal sum of $5,000. On June 28, 1869, they conveyed the mortgaged premises to one Alice Hawkins, subject to said mortgage, which she assumed and agreed to pay. On May 3, 1872, Alice Hawkins conveyed the premises to Edward L. Beatty, who also assumed the mortgage and agreed to pay it. On July 1, 1872, Beatty conveyed to Catherine L. Bukman, who likewise assumed the mortgage. On August 27, 1872, Bukman conveyed to the intestate, Robert W. Browne, subject to the mortgage, which he also assumed and agreed to pay. On October 2, 1875, Robert W. Browne conveyed the premises to Emma L. Bostwick, subject to the mortgage, which she assumed and agreed to pay. The mortgage was foreclosed by the Equitable Life Assurance Society. Upon the sale under the foreclosure decree there was a deficiency of $764.72, and a judgment therefor was docketed on October 8, 1881, against all of the above-named persons, including Robert W. Browne, the intestate. The deficiency judgment was assigned by the plaintiff in the foreclosure action to one Dexter, and by him to the claimant, Robert W. Drummond, on June 24, 1882. On July 29, 1882, a satisfaction piece duly executed by said Drummond was filed in the office of the clerk of the county of Kings, wherein satisfaction was acknowledged between said Drummond and Emma L. Bostwick for the sum of $764.72; judgment entered in said county on January 25, 1882. After the commencement of this accounting proceeding, and before the return day of the citation, the claimant Drummond filed with the administratrix a claim for the amount of said judgment with interest. Upon these facts I am of the opinion that the judgment has been paid.

The principal contention of counsel for the claimant is that the satisfaction of the judgment as to Emma L. Bostwick constituted a compromise of a joint obligation under the provisions of the Code of Civil Procedure, §§ 1942–1944. The difficulty with the contention is that the obligation is not a joint obligation, and the provisions cited have no application.

The law is now settled that when an owner of real property, personally liable on a bond secured by mortgage on the property, conveys to another subject to the mortgage, and the grantee assumes and agrees to pay it, the relation of principal and surety

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is immediately established as between the grantor and grantee. The mutual rights of the persons holding such relation must be respected by all persons having knowledge of its existence. Marshall v. Davies, 78 N. Y. 414, 421.

The claimant is clearly chargeable with such knowledge. The very judgment-roll, under which he claims specifically, sets forth the facts which create the relation of principal and surety as between Emma L. Bostwick and the intestate.

By the satisfaction piece of July 28, 1882, the claimant acknowledged satisfaction of the judgment in question as between him and Emma L. Bostwick, the principal debtor, for the sum of $764.72, its full amount. As against the intestate and the accounting administrator, this declaration is conclusive, and I accordingly find that the judgment has been paid.

The conclusion reached by me might well have been based on another ground except for the limitation placed on the jurisdiction of this court in McNulty v. Hurd, *supra*. The satisfaction of the judgment against Emma L. Bostwick clearly operated to release her as principal debtor from the liability on the judgment so as to deprive the intestate as surety of any right of subrogation on payment of the judgment by him. Under familiar and elementary rules of law, such release of the principal debtor operated also to discharge the surety. The fact that the debt had been reduced to judgment does not affect this principle. Bangs v. Strong, 7 Hill, 250; 4 N. Y. 315, 323; Alden v. Clark, 11 How. Pr. 209.

McNulty v. Hurd, *supra*, intimates, however, that relief under this head must be sought by the administrator by suit in equity. For this reason I base my conclusion upon the finding of fact that the judgment has been paid. Such taxable costs as have been occasioned by the presentation of this claim should be charged personally against the claimant.

Let decree be presented in accordance with the views hereinabove expressed.

Decreed accordingly.

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Matter of the Judicial Settlement of the Account of ANNA C. BROWNE, as Administratrix, etc., of ROBERT W. BROWNE, Deceased.

(Surrogate's Court, Kings County, June, 1901.)

Power of surrogate on reference by consent of a disputed claim — Code C. P., §§ 1822, 2743.

Where parties consent in writing that the surrogate may hear a disputed claim upon the judicial settlement of the accounts of the executor or administrator, the surrogate has power to inquire into and pass upon the payments made and may determine the amount due and the person entitled to it.

PROCEEDINGS upon the judicial settlement of the accounts of an administratrix.

James Demarest, for administratrix.

Walter F. Lewis, for claimant Drummond.

Isaac P. Hubbard, special guardian.

ABBOTT, S. It was held in McNulty v. Hurd, 72 N. Y. 518-521, "that the surrogate may inquire into, and pass upon, payments made to apply upon such judgments, and determine the amounts due thereon. He may also determine who is the owner of the judgment and entitled to the money. This power is necessary to enable the surrogate to make the decree. * * * Beyond this, the surrogate has no jurisdiction to try and determine questions in respect to the validity of judgments."

I do not think this rule has been changed in any way by the amendment to section 1822 of the Code, providing for the hearing and determination of a claim upon a judicial settlement of an account upon the written consent of the respective parties.

Section 2743 of the Code provides, "Where the validity of the debt, claim or distributive share is admitted or has been established upon the accounting or other proceeding in the surrogate's court or other court of competent jurisdiction, the decree must

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determine to whom it is payable, the sum to be paid by reason thereof and all other questions concerning the same".

The validity of the assignments of this claim has not been attacked in this proceeding, but, should they be, of course, this court would be ousted of jurisdiction. Matter of Randall, 152 N. Y. 517.

I shall hold, therefore, that the claimant may proceed with his proofs to the extent indicated in Hurd v. McNulty, *supra*, and the matter may be restored to the calendar for that purpose.

Decreed accordingly.

Matter of the Estate of JANE S. VON POST, Deceased.

(Surrogate's Court, New York County, June, 1901.)

Transfer tax — Correction of order refused — Res adjudicata.

A surrogate has no power to amend and correct an order by which a transfer tax was assessed upon a life interest in United States bonds, which were subsequently declared by the Court of Appeals to be exempt from taxation.

If it be assumed that he has the same power over his orders which the Supreme Court has over its orders, relief should not be given the party who paid the tax where he paid it voluntarily and deliberately more than five years ago under a mistake of law, which was not discovered until after the Court of Appeals had rendered its decision upon the question of the taxability of such bonds.

PROCEEDING of Herman C. von Post for an order amending an order erroneously assessing a transfer tax upon the transfer of United States bonds owned by Jane S. von Post, deceased.

The decedent died October 8, 1895, the owner of $61,000 United States bonds. They formed part of her residuary estate, which by the terms of the will was left in trust for the benefit of her husband, Herman C. von Post, during his life. Upon the basis of the value given by the State Insurance Superintendent to the life interest of the said H. C. von Post in the decedent's residuary estate, the value of his life interest in the said bonds amounted to $20,724.81. Upon this sum it is claimed that a tax of 1 per cent was assessed erroneously and without the surrogate having any jurisdiction to assess or impose the same.

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John C. Shaw, for executors.

John H. Hull, for Comptroller.

THOMAS, S. On May 9, 1896, an order was made fixing the tax upon the transfers under the will of the testator. The tax was paid April 7, 1896. An application is now made for an order amending the order fixing the tax by deducting from the taxable interest of the life tenant the value of his interest in certain United States bonds forming a part of the residuary estate, upon the ground that, as the law then stood, transfers of such bonds were exempt from the transfer tax. By Laws of 1896, chapter 908, section 209, being the "Tax Law," it is enacted that the Surrogate's Court "shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized to be done by a surrogate in other matters or proceedings coming within his jurisdiction." In Estate of William P. Earle, N. Y. L. J., Oct. 31, 1900, I expressed the opinion that, under this provision of law and under the general power inherent in every court, I could correct an error in an order fixing a tax caused by my own inadvertent error and oversight of a jurisdictional defect on mere motion and without an appeal. The subsequently reported opinion of the Appellate Division in Matter of Crerar, 56 App. Div. 479, would limit this power and, although in that opinion no allusion is made to the provision of the statute above referred to, and the decision might possibly be distinguished, I must hold myself bound by the views of that court. This alone would require a denial of the present application, but I think it should also be denied on other grounds. Assuming that I have precisely the same power to correct the order in question that the Supreme Court has over one of its orders, such power should not be exercised after the lapse of more than five years, and after a voluntary payment had been made under it, and on the mere ground that, with full knowledge of the facts, without inadvertence and deliberately, but on a mistake of law, an order was made, which mistake was only discovered by a subsequent decision of the Court of Appeals. It is essential to the peace of the community that judicial action shall import some degree of finality; absolute freedom from error is never attainable, but the

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methods for review prescribed by law should ordinarily be deemed the exclusive methods. To assume to pass upon the legal correctness of any order or decree made by myself or any of my predecessors, which might be challenged on the mere motion of anyone in interest, would amount to the assertion of a jurisdiction which, if sustained, would not be desirable either for the court or litigants. Matter of Dey Ermand, 24 Hun, 1. The application is denied.

Application denied.

Matter of the Appraisal under an act in Relation to Taxable Transfer of Property of the Estate of MARKS LEOPOLD, Deceased.

(Surrogate's Court, New York County, June, 1901.)

Transfer tax — Moneys of non-resident temporarily deposited within the State when not taxable.

Moneys which a non-resident decedent had temporarily on deposit within the State of New York at the time of his death for the purpose of investing them in the stock of a foreign corporation are not subject to the transfer tax, although the decedent died before the transaction was completed.

APPEAL by the comptroller of the city of New York from an order assessing the transfer tax upon a fund.

T. F. Hamilton, for Comptroller.

Wm. P. Williams, for respondent.

FITZGERALD, S. Decedent, a non-resident, died April 19, 1899. Three days prior to his death he deposited $100,000 in this city to the credit of a syndicate formed for the purpose of purchasing stock of the Continental Tobacco Company, a New Jersey corporation. On May 6, 1899, the stock called for by the certificate issued to the depositor was delivered to the executors. In other words, the decedent sent $100,000 to this city for the purpose of purchasing stock in a foreign corporation, and, because

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he died before the transaction was completed, the State seeks to levy a transfer tax upon the fund. I am called upon to determine, therefore, whether article 10 of the Tax Law (L. 1896, ch. 908) taxes property of a nonresident thus transitorily within the State. In Matter of Romaine, 127 N. Y. 80, the Court of Appeals says: "We should hesitate before applying the statute to any property casually brought into the state for a temporary purpose. * * * It might well be held that such property, although literally 'within this state,' was not here in the sense meant by the statute, on account of the transitory and accidental character of its presence and the immediate custody of the owner. Where, however, the money of a nonresident is invested in this state, as it was by Mr. Romaine in the bond and mortgage in question, and in the deposits made by him in the savings banks, or where the property of a nonresident is habitually kept, even for safety, in this state, we think that the statute applies both in the letter and spirit." In Matter of Enston, 113 N. Y. 182, the court uses the following language: "Suppose a foreigner should come here with negotiable securities in his possession for the purpose of buying property here, and soon after should die here. Or suppose a merchant should come here from some other state with negotiable drafts or securities in his possession and should die here shortly after reaching this state; can it be supposed in either of such cases that it was the legislative intent that before the property of the decedent could be taken out of this state to the jurisdiction of his domicile it should be subjected to a tax to enhance the revenues of the state?" While neither of these cases furnishes a precedent for the disposition of the issue here, the language of the court indicates with no uncertain meaning the trend of opinion and decision. The order appealed from is affirmed.

Order affirmed.

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Matter of the Judicial Settlement of the Accounts of SUSIE SHAFER, as Executrix, Etc., of JOSEPH S. BABCOCK, Deceased.

(Surrogate's Court, New York County, June, 1901.)

Equitable assignment.

An instrument by the terms of which a person, named as executrix and residuary legatee of a will, agrees with attorneys that if they succeed in having it admitted to probate she will pay them one-half the sum collected by her thereunder, less certain deductions, and that their share shall become due and payable as and when she collects, is not an equitable assignment to the attorneys of the fund but a mere covenant that she will pay therefrom after it shall have reached her hands. It creates no lien, authorizing the attorneys to compel her to account as executrix for one-half the fund, as it does not authorize the holder thereof to pay it directly to the creditors without her intervention.

APPLICATION against an executrix to compel an accounting.

Joseph McElroy, for petitioner.

Job E. Hedges, for executrix.

THOMAS, S. The application is against an executrix to compel an accounting, and the petitioner alleges that the executrix, who is also the residuary legatee named in the will, "duly assigned one-half of her legacy and interest in said estate to" the petitioner and another person. The answer of the respondent denies having executed any assignment, but admits the execution of a paper, a copy of which is submitted, which paper the petitioner concedes to be the instrument relied upon by him as an assignment, and it is his contention that it must be treated as an "equitable assignment." This is an agreement between the respondent, as an individual, and two lawyers, one of them being the petitioner, by which the lawyers agree to prosecute a proceeding to procure the will of the decedent to be admitted to probate. In case of failure the respondent agreed to pay the costs and disbursements. In

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case of success the respondent was to retain out of any amount received by her the sum of $225 due by the decedent to her, and she agreed to pay to her lawyers one-half of all sums recovered or collected over and above costs and disbursements. It is further stipulated "that said compensation is to become due and payable upon the receipt by the party of the second part * * * of any sum or sums of money whatsoever, by reason of the matter of proving the said last will and testament, and collecting and recovering the legacies of the party of the second part thereunder." The will was admitted to probate and about $1,188 was collected, which was divided under the agreement, but it is alleged that the respondent has collected about $400 more of assets, and the purpose of the proceeding is to require a division of this. As I construe this agreement it is not an assignment, either equitable or legal, but a mere covenant to pay from a specified fund after that fund has reached her hands. Such a covenant does not create an equitable lien upon the fund or operate as an equitable assignment thereof. Rogers v. Hosack's Executors, 18 Wend. 319; Williams v. Ingersoll, 89 N. Y. 508, 518. "Something more is necessary. There must be an application of the fund *pro tanto*, either by giving an order, or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor, without the further intervention of the debtor." Thomas v. New York & G. L. R. Co., 139 N. Y. 163, 179; Wemple v. Hauenstein, 19 App. Div. 552. This conclusion requires a dismissal of the proceeding. Settle order on notice.

Proceedings dismissed.

GEORGE M. MILLER, Respondent, *v.* JOHN C. BARTH, Appellant.

(City Court of New York, General Term, June, 1901.)

Principal and agent — Broker's commissions.

When a real estate broker finds a responsible purchaser whom the principal accepts, the latter must pay the broker his commissions, and cannot dismiss him capriciously and without payment because, for some unexplained reason, the principal became dissatisfied with the purchaser during subsequent negotiations had with him.

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Misc.] City Court of New York, June, 1901.

APPEAL from a judgment entered on a verdict, and from an order denying a motion for a new trial.

Lippmann & Ruck (William J. Lippmann, of counsel), for appellant.

Elliott, Jones & Escher (Henry Escher, of counsel), for respondent.

CONLAN, J. The action was to recover the commissions of a broker on the sale of real estate in New York City. The defendant had purchased some unfinished buildings at a sale in foreclosure, and desired to find a purchaser therefor. The plaintiff and his assignor, who were then partners, were employed by the defendant as brokers in the premises and procured a customer for the defendant, who was able and willing to perform, and who was accepted by the defendant. The broker had then complied with all the conditions to entitle him to his compensation, which had been fixed at one per cent. of the purchase price, or $850. The defendant and the customer then proceeded to arrange some details connected with the transaction, a part of which consisted of the preparation of certain bonds and mortgages, to be delivered as a part of the consideration, and these were executed and delivered, and the customer also paid the amount required for the revenue stamps to affix to the papers.

It is not to be contended that the broker was in any way interested in or had any part to perform in the details of the transaction. No written contract between any of the parties was entered into, it being stated by the defendant, as it appears from the evidence, that the deed was to be passed direct to the new purchaser in order to save expense. Several meetings and interviews appear to have been had between the defendant and his purchaser, having in view the completion of the transaction. As a part of the details, a building loan was to be made by the defendant to his purchaser, with which to complete the building, and it was claimed that because of this the commission of the broker had not been earned until the latter was executed. In this connection it is shown by the evidence that the purchaser was at all times willing to enter into the building-loan agreement, but that

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for some reason, and precisely what does not appear, the defendant declared the transaction off before the completion of this particular instrument, and thereafter alleged as a reason for nonperformance that the property had been sold to other parties. Whether this was so or not, the defendant testified on the trial that he was then the owner of the premises in question.

If the defendant is to be permitted to escape liability by a summary dismissal of his customer after the minds of the parties have met, then there might be created a condition where the broker would under no circumstances be entitled to his commission, and there would soon be an end to all contracts through the instrumentality of the agent, and brokers would not be found looking for principals to buy or sell. The law however has long since become setttled in matters of this kind, and brokers have become a necessary means to the originating or carrying out of operations both large and small, and few transactions are to-day carried on without their agency and active co-operation. It is necessary that some limit be put to the caprice of the principal, otherwise, for any reason whatever, he might, at any stage in the transaction whether before or after negotiations had been completed, summarily dismiss the broker with the naked declaration that the deal was off, and deprive the latter of his justly earned compensation. In this case, then, the broker having found a responsible purchaser who came to an agreement with the latter, he performed his contract with his principal, and could not, therefore, be deprived of his commissions.

The record presents to our mind nothing which calls for an interference with the determination reached at the Trial Term, and the judgment and order appealed from must be affirmed, with costs.

O'Dwyer, J., concurs.

Judgment and order affirmed, with costs.

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ELIZABETH W. KETCHAM, as Administratrix, Etc., of JOHN B. KETCHAM, Deceased, Respondent, *v.* RAFAEL R. GOVIN, Appellant.

(City Court of New York, General Term, June, 1901.)

Bills and notes — Wrongful diversion — Notice.

The right of a holder of wrongfully diverted negotiable paper, acquired by him for value and before maturity, to recover thereon cannot be defeated without proof of actual notice of the defect in title, or bad faith on his part evidenced by circumstances.

A *bona fide* purchaser of negotiable paper is not bound at his peril to be on the watch for facts which might put a very cautious man on his guard.

MOTION by the plaintiff for judgment upon a verdict for $635.20 directed in her favor at a Trial Term of the City Court of the city of New York, subject to the opinion of the said court at General Term. The action was brought by John B. Ketcham, who died pending the action, and the plaintiff was substituted as his administratrix. It was stipulated by the parties that the $2,000 check, referred to in the opinion, and which Felipe Carrion tendered to the defendant, was a forgery.

John C. Tomlinson, for appellant.

James B. Butler, for respondent.

CONLAN, J. The action was brought to recover the unpaid balance on a check for $704, drawn by the defendant to the order of one Felipe Carrion, and indorsed by him and delivered to the plaintiff's intestate. The answer admits the making and delivery of the check, and that payment of the check was stopped, and alleges that Carrion procured the check from defendant by fraud. The check in question arose out of the following transaction: One Alfredo Govin was indebted to the defendant in the sum of $1,300. Carrion, claiming to represent Alfredo Govin, tendered to the defendant a check of $2,000 in payment, and received back

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the check of the defendant for $704, the difference. The check for $704 was delivered to the plaintiff's intestate, who returned his check for $618.50, leaving $85.50, which was the amount for which Carrion and Alfredo Govin were indebted to Ketcham, and this latter amount Ketcham retained. Carrion and Alfredo Govin, the latter a relative of the defendant, were partners. This transaction forms the substance of a separate defense in the answer of the defendant, and it was stipulated upon the trial that the facts, as alleged, were true. The defendant offered no evidence, and submits no brief on the argument before us. The check in question was taken by Ketcham in absolute payment, and the person who delivered the same received full value for the difference between the amount of the check and the amount of the debt owing to Ketcham, and the right of a holder of wrongfully diverted negotiable paper, acquired by him for value before due, cannot be defeated without proof of actual notice of the defect in title, or bad faith on his part, evidenced by circumstances. Laws of 1897, chap. 612, §§ 91, 95, 96; Cheever v. Pittsburgh, S. & L. E. R. R. Co., 150 N. Y. 59; Cowing v. Altman, 71 N. Y. 435. Nor is the purchaser of negotiable paper for value and before maturity bound at his peril to be on the watch for facts which might put a very cautious man on his guard. Second National Bank v. Weston, 161 N. Y. 521.

It follows, therefore, that there must be a judgment for the plaintiff, with costs, as directed at the Trial Term, and with costs of this appeal.

O'Dwyer, J., concurs.

Motion granted, with costs.

George Liesum, Appellant, v. George J. Kraus, Respondent.

(City Court of New York, General Term, June, 1901.)

Bankruptcy — Debt not discharged where schedules give creditor's name incorrectly — Code C. P., § 1268.

Where the schedules of a bankrupt describe a judgment creditor named George Liesum as George Liesman, the bankrupt's discharge

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does not release the debt as against George Liesum and therefore the judgment cannot be subsequently discharged of record as against him.

Conlan, J., dissented.

APPEAL by the plaintiff from an order, made under Code of Civil Procedure, section 1268, discharging a judgment, in favor of the plaintiff against the defendant, on the ground of the discharge of the latter in bankruptcy more than one year before the motion.

Goeller, Shaffer & Eisler (Robert Goeller, of counsel), for appellant.

Charles L. Hoffman, for respondent.

CONLAN, J. (dissenting). The plaintiff, on the 6th day of April, 1896, recovered a judgment in this court against the defendant, and thereafter, and on June 6, 1899, an order was entered in the District Court of the United States for the Southern District of New York by which the defendant was discharged from the payment of his debts and liabilities, and this, as a matter of course, discharged the defendant from all liability under said judgment, if his proceedings in the latter tribunal were just and fair.

It appears from the record before us that the plaintiff's claim and judgment were correctly inserted as to amount and date in the schedules of the defendant in the proceedings in bankruptcy, but that, through a mere clerical error, the name of the plaintiff was given therein as George Liesman instead of George Liesum. It nowhere appears that there was any attempt made to conceal the indebtedness of the defendant on this judgment, and there was nothing in the record in the United States Court to which our attention has been called, indicating any fraud or concealment or any design or intent on the part of the debtor to conceal or suppress the judgment in question, and finding no reason to disturb the order made at Special Term, it follows that the same should be affirmed, with costs.

HASCALL, J. Even if the alleged clerical error were a mistake, it was still a serious matter to plaintiff, and defendant

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should not be permitted to profit by his own wrong. Order reversed, with ten dollars costs and disbursements, and motion denied.

O'DWYER, J., concurs with HASCALL, J.

Order reversed, with ten dollars costs, and motion denied.

JOHN E. HAGMAYER, Respondent, *v.* LEOPOLD ARMBRUSTER, Defendant, and HENRY GUNTHER, Appellant.

(City Court of New York, General Term, June, 1901.)

Judgment — Reversed without an exception to the charge.

Where the verdict, in an action for goods alleged to have been sold to a firm of two partners, was not supported by the evidence and the appellate court considered that the jury were misled either by their own assumptions as to the law of the case or by the charge of the trial court as to the liability of both defendants, the court reversed the judgment, although the sole defendant answering did not except to the charge made.

APPEALS from a judgment entered upon a verdict for $174.36 for the plaintiff, and from an order denying a motion for a new trial. Action to recover $168 for goods alleged to have been sold the defendants as partners, between July 8, 1899, and October 20, 1900 — amounting to $936, on which $768 had been paid, leaving a balance of $168. The partnership created in October, 1898, was apparently dissolved by an agreement executed July 13, 1899. The statements of account referred to in the opinion were made by the plaintiff to "L. Armbruster." The plaintiff testified that he himself made deliveries on July 8 and 12, 1899, amounting to $58, and that the others were made by a person, not produced on the trial. The defendant Gunther did not except to the charge quoted in the opinion. The defendant Armbruster did not answer or demur.

Max D. Steuer, for appellant Gunther.

Alfred Beekmann (Francis W. Russell, of counsel), for respondent.

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HASCALL, J. It appears to us that the allegations of the defendants were quite fully corroborated upon the trial by the facts, exhibits, and circumstances shown by the plaintiff himself, and that the burden of proof was not sustained. The verdict was not only clearly against the weight of evidence, but it seems that the jury were misled, either by the charge of the learned court below, or by the assumption, on their part, that statements of account rendered to one of the defendants, in his individual name, were sufficient to carry evidence of liability against both of them as partners.

The court charged "Now, unless they can show that the balance of $168 applies to the two deliveries, for which the plaintiff claims his charge, then you must find as I have stated. If you find that both of these deliveries were not paid for in the payment of $768, then you can find against both of the defendants for those two deliveries." This was manifestly not only prejudicial to the defendants, but was error in law, because, if sale and delivery were never made to Gunther, nor to the firm of which he was a member at the time, and plaintiff had knowledge of dissolution of defendants' firm, plaintiff could, in no event, recover. Schwab v. Elias, 2 Civ. Pro. 340.

Judgment and order appealed from should be reversed and a new trial ordered, with costs and disbursements to appellant to abide the event.

CONLAN and O'DWYER, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

JOHN PODMORE, Administrator, Etc., of ANNIE PODMORE, Deceased, Respondent, *v.* THE SEAMEN'S BANK FOR SAVINGS, Appellant.

(City Court of New York, General Term, June, 1901.)

Evidence — Code C. P., § 829 — Defense of payment to donee causa mortis of depositor.

Where an administrator of a depositor sues a savings bank for the depositor's balance of account, and the bank answers that it has

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paid it to a third party as donee *causa mortis* of the depositor, the bank has a right to the testimony of the donee regarding the gift and its exclusion, under Code C. P., § 829, is erroneous.

APPEAL from a judgment for the plaintiff entered upon a verdict directed by the court. Action to recover a balance due Annie Podmore, the plaintiff's intestate, upon an account which she had with the defendant. The defendant answered that the depositor had made a gift of the deposit, *causa mortis,* to one Bridget Reilly and that it had paid the money to her.

Henry S. Wardner, for appellant.

Hymes, Woytisek & Schaap (Michael Schaap and Edward Hymes, of counsel), for respondent.

HASCALL, J. We think that the court at Trial Term erred in striking out the testimony of Bridget Reilly, and in not submitting to the jury the question as to whether there had been a gift to her of the money deposited and the account, kept with the defendant bank, already paid over and closed — it was the direct issue involved under the defendant's pleading.

Mrs. Reilly is not an interested party, to be precluded from testifying, under section 829 of the Code of Civil Procedure, is not a party at all, nor "a person from, through or under whom such a party * * * derives his interest." The bank, it appears, in no way succeeded to her title, and she is not "interested in the event," within the meaning of the statute, and could not be bound by the judgment, whichever way it should go; for these reasons her testimony was competent, 62 N. Y. 80; 104 id. 507; 113 id. 242.

Judgment and order should be reversed and a new trial ordered, with costs to appellant to abide the event.

O'DWYER, J., concurs.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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CHARLES V. R. MARSH, Respondent, *v.* THE STANDARD STRUCTURAL CO., Appellant.

(City Court of New York, General Term, June, 1901.)

City Court of New York — Preference under Rule XIV.

Under Rule XIV of the City Court of the city of New York the plaintiff cannot procure an action against a corporation, founded upon a note, and whose trial is not likely to occupy more than one hour, to be placed on the short cause calendar in Part IV where his only claim for a preference has been based on Code C. P., § 791, subd. 8, that the action is against a corporation and founded on a note.

APPEALS by the defendant, appellant, from an order made May 2, 1901, advancing this case for trial on the short cause calendar in Part IV, and also from an order made May 13, 1901, amending the same and sending the case to Part I for trial. The plaintiff first noticed the case for trial for April tenth, and his motion for an order placing it on the short cause calendar was made returnable April ninth. He defaulted but the default was opened and the order of May 2, 1901, was made. The defendant procured this to be modified by the order of May 13, 1901. Rule XIV of the City Court provides for placing on a special calendar in Part IV actions on contract likely to be tried in one hour. The action was upon a promissory note made by the defendant, a corporation, and subsequently indorsed to the plaintiff.

William R. Adams, for appellant.

Walter F. Wood, for respondent.

HASCALL, J. The respondent evidently mistook his right under section 791 of the Code of Civil Procedure. He was doubtless entitled to a preference on either of two grounds, but could not urge a right to a statutory preference for the reason that he could try his cause within an hour, or *vice versa*. He claimed the right to advance a one-hour cause under subdivision 8 of the said section. He should have noticed and moved at Trial Term for advancement (92 N. Y. 647, 13 Civ. Pro. 166), or else

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made his motion to have the cause placed upon the calendar of Part IV because on contract.

Rule XIV (of the City Court), cannot operate, nor was it promulgated, to overstep the practice ordained by the Code; but to provide a needful, additional relief, in certain cases not specified in the statute. The amendatory order of May thirteenth became unavailing, and a second notice of trial did not cure plaintiff's infirmity of practice. 12 N. Y. Supp. 725.

For these reasons the order of May 13th and of May 2, 1901, should be reversed, with one bill of costs and disbursements of appeal to the appellant.

CONLAN and O'DWYER, JJ., concur.

Orders reversed, with one bill of costs of appeal to appellant.

THE SCOTT SHOE MACHINERY CO., Appellant, v. FRANK BROAKER, et al., Respondents.

(City Court of New York, General Term, June, 1901.)

Accountant — Has no lien on books examined.

Accountants who have done nothing to books of account beyond examining them at the request of the owner have no lien thereon for their services, and cannot upon that ground withhold the books from him.

APPEAL by the plaintiff from a final judgment entered in favor of the defendants and against the plaintiff for $213.40, with notice of an intention to bring up for review an order overruling a demurrer to the answer, an order directing an interlocutory judgment overruling said demurrer, and the interlocutory judgment overruling the same.

Alexander & Green (W. Lloyd Kitchel, of counsel), for appellant.

J. Philip Berg, for respondents.

O'DWYER, J. This is an action of replevin for the wrongful detention of certain books of account. The defendants admit having possession of the books and that the books are the prop-

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erty of the plaintiff. In order, therefore, to be able successfully to defend this action it is evident that defendants must allege facts showing that the books have not been wrongfully detained. Unless the allegations contained in the fourth and fifth paragraphs of the answer set forth such facts, it is clear that they do not constitute a separate and distinct defense, and that the demurrer should have been sustained.

The facts alleged in the portion of the answer demurred to state that defendants were employed by plaintiff to examine and investigate the accounts contained in certain books at an agreed price of $300, that the examination has been made and that $150 of the agreed price has not been paid to defendants, for which sum they claim a lien on said books and property herein above-mentioned for the services performed by them as aforesaid.

The defense claimed is that they have a common-law lien on the books and that their detention of them is, therefore, legal and not wrongful. It follows that if, on an examination of the allegations, it appears that defendants have no lien on the books, then, their detention of them is wrongful, and the demurrer to this alleged defense should have been sustained.

At common law liens were given to attorneys, warehousemen, wharfingers, and to other special classes of persons. There was no such thing as an accountant's lien. And, except in the case of these favored classes, the only persons having a lien at common-law are bailees employed to change, alter, repair, or do work upon some article, and who, by their services, have added something to its value. In this latter class are the liens of tailors, carpenters, etc. This class appears to be the same as is provided for by section 70 of the New York Lien Law. The defendants certainly do not come within this class. They have done nothing to the books, but have merely made an examination of them. After their examination the books remained as they were before, nothing whatsoever having been added to their value. The object of the examination made by an accountant is the preparation of a report. The report may be something of value, or it may not, but the books themselves are not the least changed or improved by the investigation. In De Vinne v. Rianhard, 9 Daly, 406, Chief Justice Charles P. Daly said: "The courts have recognized and allowed without restriction, the right of every bailee to a lien on the goods bailed to him, where any additional value has been

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conferred by him on the chattel, either directly by the exercise of personal labor and skill or indirectly by the intermediate use of any instrument over which he has control; and that the right, when it does not exist from usage, or is not obtained by contract, depends upon whether any additional value has been conferred by the bailee on the chattel, may be illustrated by the decision in Jackson v. Cummins (5 Mees. & W., 342), that an agister, or one who takes charge of horses or cattle, has no lien for their keep, because he does not confer any additional value on the animal but merely takes charge of it and feeds it; and the decision in Scarfe v. Morgan (4 Mees. & W., 270), that one who receives a mare to be covered by a stallion has a lien, as the mare may be more valuable by proving in foal; in the first of which cases Baron Park declares the rule to be as follows: The general rule is, in the absence of any special agreement, that, whenever a party has expended labor and skill in the improvement of a chattel bailed to him, he has a lien upon it." Applying these rules to the answer in question, it is to be noted that the defendants fail to allege either of the following facts, both of which are essential to their defense: 1. That they either made, altered or repaired the books. 2. That they added to their value or improved them.

The judgment and orders appealed from should be reversed, and the demurrer sustained, with costs, with leave to the defendants to amend upon the payment of costs.

CONLAN and HASCALL, JJ., concur.

Judgment and orders reversed, and demurrer sustained, with costs, with leave to defendants to amend upon payment of costs.

THOMAS HEALY, Appellant, *v.* LUKE A. BURKE, Respondent.

(City Court of New York, General Term, June, 1901.)

Negligence — Maintaining scaffold in safe condition — Contributory negligence.

Under the Labor Law (L. 1897, ch. 415, § 18), an employer is not only bound to furnish his employee a safe scaffold, but he must maintain it in the condition which the statute requires shall be created in the first instance.

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Where a laborer using a wheelbarrow was thrown from a scaffold made of planks, with planks overlapping the joints, because, preparatory to removing the scaffold, an overlapping plank, which might have prevented the accident, had been removed by order of his foreman at a time when the laborer was below, the court held the laborer entitled to recover because the scaffold had not been left in a safe condition; and further held that the fact that he, when ordered by the foreman to go on the scaffold, failed to observe the absence of the overlapping plank, raised no question of law but only one of fact as to his contributory negligence.

APPEAL from a judgment entered in favor of the defendant upon the dismissal of the plaintiff's complaint, at the close of his case.

Leventritt & Brennan (George M. Leventritt and Samuel P. Goldman, of counsel), for appellant.

Blumenstiel & Hirsch (Morris J. Hirsch, of counsel), for respondent.

O'DWYER, J. Upon the trial it appeared that the defendant was erecting a building at Attorney and Rivington streets, New York city; that the plaintiff was a day laborer, and was working for the defendant on the day of the accident under the immediate supervision, control and direction of one John Horgan, who was the foreman, also in the employ of the defendant; that on the day of the accident about 2 or 3 o'clock in the afternoon the foreman directed the plaintiff to remove some brick from a certain scaffolding in said building. The scaffolding was constructed of boards over beams, the ends of the boards meeting; there was a lap or board across the planks that held the planks in place; these boards or planks were about thirteen or fourteen feet long, and, from the testimony of the witnesses in regard to them, it would appear that they were the usual planks about a foot wide and about an inch thick. To reach the scaffold it was necessary to come down one runway and go up another. The plaintiff, pursuant to the direction of his foreman, had removed about thirteen or fourteen wheelbarrows of brick from the scaffold, and was about to take another load. It seems that he went up the runway and passed along on the scaffold, and had reached a place over

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forty feet from the runway, when, with his wheelbarrow in front of him, he stooped to fill it up with brick, and the plank tipped with him and he went down.

Plaintiff gave, as his version of the reason why the plank tipped with him and he went down, the fact that the lap had been taken off from the end of the plank on which he had to step. He further testified that the scaffold was all right at the time he went on it for his first thirteen or fourteen loads, but that it was not left so, that the foreman sent a man to take off the plank while plaintiff was away with a load of brick, and that he knew nothing at all about the plank (lap) being off, that when he came back on his last trip he did not look to see whether the lap was in place or not, as he was in a hurry, that the foreman was over him and had told him to hurry up; he further said the lap was there before his last trip, that the lap was not nailed, that he did not think any of the laps were nailed, and he didn't see anybody remove the lap from the plank on which he fell, nor was he told that the lap was removed, and that he didn't know the scaffolding was being taken down. It was also proven by the testimony of James McElroy that the scaffold was being taken down under the direction of Horgan, the foreman. Referring to this McElroy swore that "they were doing that and were told to rush the work." Upon cross-examination this witness swore that "the plank was passed up by Cuneo (another worker) before he took off all the bricks." This witness saw the accident and described it as follows: "Healy went up there to remove the brick. Q. And while he was in the course of this trip — [interrupted]? A. Charlie Cuneo (another workman) passed the plank up to the next floor. Then Healy went on the scaffold, put his wheelbarrow down and toppled over. I saw the plank tip up; he was stooping down."

Section 18 of the Labor Law (Laws of 1897, chap. 415), provides: "A person employing or directing another to perform labor of any kind in the erection, repairing, altering, or painting of a house, building or structure, shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of the person so employed or engaged."

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The law thus declares that the defendant was bound to erect and furnish a safe, suitable and proper scaffolding for the use of this plaintiff, and when the law has so declared, it is but reasonable to say that the intention of the law is that the duty thus imposed can only be performed by maintaining the condition that the law required to be created. It thus follows that, not only was it the duty of the defendant to erect and furnish a safe scaffold, but he was bound to maintain it in that condition during the time the plaintiff was required to work thereon pursuant to his orders, and his failure to do so would be negligence. The fact that the plaintiff did not look and observe that the lapped plank had been removed did not create a question of law, but one of fact as to his contributory negligence, and that question was for the jury to determine.

The claim that the accident occurred through the negligence of a fellow-servant is without force under the facts in this case. We hold that defendant's duty called upon him to provide a safe and suitable scaffold for the plaintiff to work upon, and to maintain the same in a safe and suitable condition.

The judgment appealed from should be reversed, and a new trial ordered, with costs to appellant, to abide the event.

CONLAN, J., concurs.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

LEON G'SELL, Appellant, *v.* THE METROPOLITAN STREET RAILWAY CO., Respondent.

(City Court of New York, General Term, June, 1901.)

Negligence — Contributory — Proximity to surface car made necessary by posts of elevated railroad.

Where the proof, in an action for a husband's loss of his wife's services caused by the defendant's alleged negligence in running its electric surface car, shows that the posts of an elevated railroad in the street made it necessary for the wife to stand within two feet of the defendant's track in order to see whether its cars were approaching her street crossing, and that, while in this position, the fender of

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a car, coming very rapidly and without ringing a bell, caught her clothes, dragged her down and broke her leg, it is erroneous for the court to dismiss the complaint upon the ground of her contributory negligence.

APPEAL from a judgment in favor of the defendant upon the dismissal of the plaintiff's complaint, at the close of plaintiff's case, and from an order denying plaintiff's motion for a new trial. Action for the loss of the services of the plaintiff's wife, who was run over by an electric car of the defendant.

Nicholas & Porter (Louis H. Porter, of counsel), for appellant.

Henry A. Robinson (John T. Little, of counsel), for respondent.

O'DWYER, J. The complaint was dismissed at the close of the plaintiff's case on the ground that the plaintiff's wife was guilty of contributory negligence, and that such negligence necessarily defeated this action.

From the evidence it appears that the plaintiff's wife attempted to cross Second avenue, in the borough of Manhattan, from west to east, on the north side of Thirty-first street; that she stopped at the curbstone on the northwest corner and looked to see if the way was clear, and could not see any car. She says on her direct examination: "I was coming out from the butcher shop and I stopped at the curbstone of the sidewalk and I looked up. I saw no car coming, and I went over easy to the avenue. There behind the elevator, I could see no car, and the car was not ringing and was coming too fast without ringing a bell, and I made a step and the car catched my clothes, broke my leg, dragged me down. The car just came and hit me. He was too quick and came like the wind and tore my clothes."

After all the pliantiff's evidence was in the plaintiff was recalled, and in answer to questions by the court stated: "I was first on the sidewalk. I went down on the sidewalk from the curbstone, down with the avenue, and there I was looking up and I saw no car. Then I walked very slowly to the avenue, and I come right between the two elevated posts, and I was looking up and I could see no car. Something must be before me. Q. How far were you from the track when you last looked? A. Oh, well, I was always three of four feet away. Q. Three or four feet

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away from the track? A. Yes, sir. Q. Then what did you do? A. I don't see the car and I made an easy step and I wanted to go ahead and the fender catched my clothes, dragged me down, my leg broke, my ankle. Q. The last time you looked you said was when you were three or four feet away from the track? A. Yes, sir. Q. Then you made an easy step? A. Yes, sir. Q. And got onto the track? A. No, sir. Q. How far from the track? A. Well, I was always — I can't say, about so far. (Witness indicated with her cane.) Q. You were that far from the track, about two feet? A. Yes, sir. Q. And then that car came right on you? A. The car was so quick, without ringing a bell."

This evidence undoubtedly made a case for the submission to the jury of the questions of defendant's negligence and plaintiff's freedom from contributory negligence. The fact that the plaintiff was injured when two feet away from the track of the defendant, which position she had to reach after arriving at the elevated post, before being able to see whether a car was approaching or not, clearly made a case within the authorities for the jury to pass upon. The cases of Schwarzbaum v. Third Avenue R. R. Co., 54 App. Div. 166, and Mitchell v. Third Avenue R. R. Co., 62 id. 371, sustain these views.

Judgment and order appealed from reversed and new trial ordered, with costs to appellant to abide the event.

CONLAN and HASCALL, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

SIMON GINSBURG et al., Respondents, *v.* THE UNION CLOAK AND SUIT COMPANY, Appellant.

(City Court of New York, General Term, June, 1901.)

Corporation — Contract made before its organization — Admissions of officers.

A foreign corporation named The Union Cloak & Suit Co. cannot be held liable on renewal notes made by a domestic corporation under its name of The Union Cloak Co. where the merchandise debt repre-

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sented by the notes was created before the foreign corporation was organized and it never received any benefit of the goods nor any other consideration for the notes.

Statements of officers of the foreign corporation, made to the payees of the notes, that it used the name Union Cloak Co. in signing its notes, and that the corporations were the same, cannot in such case make the foreign corporation liable to the payees.

APPEAL from a judgment entered upon a verdict in favor of the plaintiffs, and from an order denying a motion for a new trial.

Louis A. Jaffer, for appellant.

Max D. Steuer, for respondents.

O'DWYER, J. The notes in suit are made by the Union Cloak Company, a corporation organized under the laws of the State of New York, and were issued in renewal of other notes of the same corporation, given in settlement of a claim against said corporation for goods sold to it in 1899.

To maintain this action against the defendant, a corporation organized under the laws of the State of New Jersey, after the debt for which the notes were given was incurred, it is claimed that at the time of the giving of the notes in suit the president and the secretary and treasurer of the defendant corporation stated to the plaintiffs that the notes in suit were the notes of the defendant, and that the form in which they were signed was the form used by the defendant for signing its notes, and that the Union Cloak Company and the Union Cloak & Suit Company, this defendant, were the same; that by reason of these statements the notes are the notes of the defendant and it is liable thereon.

The debt for which the notes were given was contracted prior to the time that the defendant corporation had a legal existence, and the record fails to disclose any evidence showing that this defendant received any benefit from the goods purchased by the Union Cloak Company, and it appears that no other or further consideration is claimed as having been given for the notes in suit.

It follows that the defendant is not liable upon these notes, and

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the judgment and order herein appealed from must be reversed and a new trial ordered, with costs to appellant to abide the event.

CONLAN and HASCALL, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

THE HAMPTON AND BRANCHVILLE RAILROAD AND LUMBER COMPANY, Respondent, *v.* ROBERT R. SIZER AND THE AMERICAN SURETY COMPANY, Appellants.

(City Court of New York, General Term, June, 1901.)

Replevin — Counsel fees and traveling expenses not recoverable.

Counsel fees, and the traveling expenses of the president of a corporation made necessary by the litigation, are not recoverable by the corporation as damages in an action brought by it to recover certain of its personal property and damages for its unlawful detention.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial.

Eustace Conway, for appellant Sizer.

Henry C. Willcox, for appellant American Surety Co.

Willis B. Dowd, for respondent.

Per Curiam. The record in this case shows that the plaintiff was the owner of the lumber in question, and entitled to its possession as against the defendants, in whose possession it was at the time of the commencement of the action.

The action is to recover possession of personal property, and for damages for its unlawful detention, and we are satisfied from the evidence in the case that the plaintiff is entitled to that relief. On the trial, however, against the objection of the defendants, the plaintiff was permitted to prove as damages expenses incurred as railroad fares by its president on several trips made to New York, occasioned by reason of the pendency of this litigation, and

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amounting to the sum of $240, together with an expense incurred for counsel fees herein amounting to $304, and the jury, by their verdict, have specifically allowed the sum of $304 as damages for lawyers' fees, and $240 as damages for railroad fares. We are of opinion that the plaintiff is not entitled in this action to either one of those items, and that the judgment must be modified accordingly. Under the complaint in this action the plaintiff is entitled to recover possession of the property sued for, or if possession thereof cannot be had, then its value at the time of the trial, together with damages for its unlawful detention, and no more; and in the absence of other evidence of such damages, legal interest upon the value will be the amount thereof.

It follows that the judgment must be reversed and a new trial ordered, with costs to appellants, to abide the event, unless within ten days the plaintiff stipulates to reduce the judgment entered herein by deducting therefrom the sum of $304 allowed as damages for lawyers' fees, and $240 allowed as damages for railroad fares, with the extra allowance thereon of five per cent., in which event the judgment and order appealed from are affirmed, without costs.

Present: FITZSIMONS, Ch. J., HASCALL and O'DWYER, JJ.

Judgment reversed and new trial ordered, with costs to appellants to abide event, unless within ten days plaintiff stipulates to reduce the judgment by deducting therefrom $304 allowed as damages for lawyers' fees, and $240 allowed as damages for railroad fares, with extra allowance of five per cent., in which event judgment and order affirmed, with costs.

THE UNITED TRACTION COMPANY, Plaintiff, v. THE CITY OF WATERVLIET et al., Defendants.

(Supreme Court, Albany Special Term, July, 1901.)

Injunction — Against a city ordinance impairing property rights by reducing speed of trolley cars — Reasonable speed.

The enforcement of a penal ordinance will not usually be restrained by injunction, but equity may restrain any act, whether or not con-

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nected with crime, which tends to impair or destroy property or property rights.

A street railroad company is entitled to enjoin a city from enforcing a penal ordinance or resolution of its common council limiting the speed of street cars in the city streets to six miles an hour, it appearing that such a speed was a detriment to the company and to its service to the public.

An ordinance of local authorities regulating the speed of street cars is required by section 98 of the Railroad Law to be reasonable and one limiting speed to only six miles an hour is unreasonable and void.

Semble, that in a city where the streets are wide, level and comparatively straight, and where for several years no accident has occurred from trolley cars running through at the rate of twelve miles an hour, such a speed would be reasonable for such cars.

MOTION to vacate an injunction.

P. C. Dugan and W. J. Roche, for plaintiff.

S. W. Russell, for defendants.

CHESTER, J. The plaintiff operates one of its trolley lines of street cars from the city of Albany through the streets of the defendant city to the city of Troy.

For a long time, as stated and conceded on the argument, reduced rate tickets for fares had been sold in Watervliet to patrons of the road. The abrogation of these by the company resulted in a slight increase of fares. While the community was under the excitement of a discussion of the methods to be pursued to secure from the plaintiff a reduction of fares and the issuance of transfer tickets, the common council of Watervliet passed an ordinance limiting the rate of speed of all street cars in that city to not exceeding six miles per hour, notwithstanding that prior to this for a long time a speed of twelve miles per hour had been permitted. The violation of this ordinance was made a misdemeanor. A large number of motormen and conductors, while operating cars, were arrested by the defendants' police charged with violating this ordinance, cars were left standing on the track, and passengers were compelled to get out and proceed on their way on foot. In one instance seventeen in one car had to get out and walk to Troy, the sergeant of police, under

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orders from the acting mayor of Watervliet having taken possession of the controller handle and reversing lever, without which the car could not be operated.

A temporary injunction was thereupon granted restraining the defendants from enforcing the ordinance until the determination of the action, and this motion is now made to vacate that injunction.

It may be conceded that the enforcement of a penal ordinance will not, as a general rule, be restrained by injunction, for the reason primarily that its validity is a question of law, which may be raised on the part of a person arrested under it by habeas corpus, or by an action for damages. Coykendall v. Hood, 36 App. Div. 558.

But this rule is subject to the qualification which is as well settled as the rule itself, and which is recognized in the case above cited, that a court of equity may in a proper case interfere by injunction to restrain any act or proceeding, whether connected with crime or not, which tends to the destruction or impairment of property or property rights. 1 Beach Inj., 75, 76, § 60; 1 High Inj. (3d ed), § 68.

It should be borne in mind that this action is not brought by a person under arrest, or who is threatened with arrest. It is not brought to determine the guilt or innocence of a defendant charged with a misdemeanor. If it were, a court of equity could not be successfully appealed to to restrain the prosecution. On the contrary, it is brought against the municipal authorities upon the allegations that they have adopted and are attempting to enforce an invalid ordinance, the enforcement of which will result in great injury to the plaintiff's rights.

If the ordinance in question is void its enforcement is not only an unlawful impairment of the property rights of the plaintiff, but the convenience and rights of the travelling public are unjustly infringed. The aid of equity may, therefore, be invoked on those grounds as well as to prevent a multiplicity of suits which must ensue if all the operators of plaintiff's cars are to be arrested for running them at a rate of speed in excess of that mentioned in the ordinance.

It is true that the charter of Watervliet gives power to its common council to enact ordinances to regulate the speed of street cars (L. 1896, ch. 905, tit. IV, § 14b), but the Railroad Law

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(§ 98) provides that the local authorities "may make such reasonable regulations and ordinances as to the rate of speed * * * as the interests or convenience of the public may require." L. 1890, ch. 565, as amd. by L. 1892, ch. 676, § 98. These statutes must be construed together, and effect must be given to both if possible. To do that it will be seen that the ordinances which are authorized to be enacted must stand the test of reasonableness, and they must be such as the interests or convenience of the public require. The interests of the public require that cars in public streets shall be operated at a rate of speed that shall be low enough not to be dangerous to the safety of the person or the property of those using the streets and the convenience of the public requires them to be operated at as high a rate of speed as is commensurate with reasonable safety. What is a correct and reasonable rate for cars operated by electricity has come, by several years' experience, to be quite well settled in this locality.

For a number of years a rate of twelve miles per hour has been permitted in Watervliet. While it is alleged generally in the moving affidavits that it was because this was a dangerous rate of speed and because of complaints made to the aldermen on account thereof, that the ordinance in question was passed, yet there is no proof that any accident has ever happened because of the higher rate. The statement, solely on information and belief, that numerous accidents have happened cannot be taken as proof. Neither is there any proof beyond the mere statement of the conclusion that the interests or convenience of the public require the change. The only specification of an accident is that at one time a car collided with a horse attached to a hose cart, but even that is made on information and belief only.

While the court may not properly look into the motives which prompted the local authorities to pass the ordinance upon the question of its validity, yet in determining the truth or falsity of the statement, in the moving papers, that it was passed because of complaints made to the aldermen on account of the dangerous rate of speed prevailing, and in determining the weight to be given to such statement, the absence of any legal proof in support of the conclusion involved therein, may properly be considered; and in considering the value of that statement as proof it need not be overlooked that the ordinance was passed at a time when the com-

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munity was excited over several alleged grievances against the plaintiff, none of which, so far as the papers indicate, had any relation to the rate of speed with which cars were operated. It is not to be believed, under these circumstances, that whatever complaints were made to the aldermen were honestly based upon any apprehended danger from the rate of speed then prevailing.

It cannot be that any considerable number of the residents of Watervliet who have occasion to use street cars honestly desire to travel at only one-half the speed generally prevailing in neighboring communities, nor that their interests or convenience would be promoted by so doing.

In each of the cities of Cohoes and Rensselaer, where the traffic on the streets is as great as in Watervliet, and also in the city of Albany, where the population and street traffic are much greater than in Watervliet, twelve miles per hour is permitted, except in some congested localities in Albany where the rate is eight miles per hour. The streets through which the plaintiff operates its cars in Watervliet are wide, substantially straight and comparatively level. No impediment exists to the operation of cars there at a fair rate of speed, and at such a rate as will best serve the interests and convenience of the travelling public. It is clearly shown that cars can be and have been operated with reasonable safety at twelve miles per hour. This is the rate generally prevailing in this locality. A speed of six miles per hour will require a car to consume twenty minutes in passing over the two miles of the plaintiff's road in Watervliet. The same rate would require one hour in going from Albany to Troy. That speed would have been no tax upon the energy of the average team doing service in the days of stages and horse cars, and will not satisfy the requirements or the convenience of travelers in cars propelled by electricity in 1901. If the plaintiff, and not the common council, had established this slow rate of speed the citizens of Watervliet would have been unanimous in raising their voices in protest.

The proofs show that during the short time the plaintiff operated its cars at this slow speed, in obedience to the requirements of this ordinance, numerous complaints were made by passengers, and it suffered a large loss of patronage.

I can come to no other conclusion on the papers submitted to me than that this ordinance is one materially impairing the prop-

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erty rights of the plaintiff; that it is subversive of the interests and convenience of the public, and that it is unreasonable, and, therefore, void.

If there has been any unjust discrimination against the residents of Watervliet on the subject of transfers by the plaintiff, or if the act of the plaintiff in abrogating the sale of reduced rate tickets has resulted in an unjust increase of rates for the transportation of passengers, as is claimed by the defendants, the remedy must be found otherwise than in the passage of a void ordinance, the enforcement of which is not only destructive of the property rights of the plaintiff, but also a serious interference with the rights of the traveling public, not all of whom, by any means, are residents of the city of Watervliet.

The motion is denied, with costs.

Motion denied, with costs.

LENA GARRETT, Plaintiff, *v.* BRADFORD R. WOOD et al., Defendants.

(Supreme Court, Albany Special Term, July, 1901.)

Nuisance — Upper proprietor when not liable to lower for surface water running down.

Where city properties lie one above the other on a side hill, the owners of the upper one are not liable to the owner of the lower one because of surface water and melted ice and snow which ran down thereon, following the formation of the land, provided the owners of the upper one have not permitted thereon any improper accumulation of water, ice and snow.

ACTION for an injunction and for damages caused by an alleged nuisance. The plaintiff's lot was located on North Pearl street in the city of Albany, a street running north and south, north of Colonie street, a street running east and west. The lot ran back westerly and up a hill. The defendants' lands were directly in the rear and further up the hill. An alley running southerly to Colonie street divided the lands of the parties.

B. R. Heyward (Albert C. Tennant, of counsel), for plaintiff.

James J. Farren, for defendants.

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CHESTER, J. The defendants are not liable for any damages to the plaintiff's property which were included in the judgments in her favor in the several prior actions brought by her for the same cause, those judgments having been paid and satisfied. Garrett v. Wood, 55 App. Div. 281. Nor for any damages recoverable in such prior actions. Uline v. N. Y. C. & H. R. R. R. Co., 101 N. Y. 98, 123. The settlement of the judgments in those actions serves as a satisfaction to all the defendants in this action for such damages. Lord v. Tiffany, 98 N. Y. 412. The last of such actions prosecuted to judgment, which was settled, was commenced in the City Court August 16, 1900.

The evidence fails to convince me that since that date the plaintiff has sustained any damages for which the defendants are liable. It appears that soon after that the commissioner of public works of the city of Albany made certain changes in the alley leading to Colonie street, between the plaintiff's and the defendants' property, which caused the water from defendants' property to run out of the alley to Colonie street. That this furnishes substantial protection to the plaintiff's premises is clearly shown from the fact that the rainfall for the month of April of this year was more than double the normal rainfall, and was greater than in any other month for the past twenty-four years, and yet, during that month, no water was collected on the lands of the defendants or on the alley, or flowed from the defendants' to the plaintiff's land.

There is some testimony tending to establish that in the spring of 1901, water, snow and ice accumulated in a slight depression in the defendants' premises, and that the water overflowed upon the plaintiff's property, but there is no proof that this was caused by any change by the defendants of the natural surface of their premises, and I am satisfied that any water which has reached the plaintiff's premises from the defendants' (which has been very slight during the period covered by this action) was surface water from rains and from melting snow and ice which followed the natural formation of the land and which did not result from any improper accumulation of water, snow and ice permitted by the defendants upon their premises. For this these defendants are not liable. Vanderwiele v. Taylor, 65 N. Y. 341; Barkley v. Wilcox, 86 id. 140.

Whatever dampness has been shown to exist in the plaintiff's

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sheds at the rear of her lots adjacent to the alley is only such as is naturally incident to a location such as that is, or was caused by the natural flow of the surface water, for which the defendants are in no wise liable, and which could have been wholly prevented by the exercise of slight care by the plaintiff in fulfilling the covenant in her deed requiring her to conform the grade of the alley in the rear of the premises so as to throw the water coming from defendants' lots on the west of the alley to Colonie street.

The complaint should be dismissed, with costs.

Complaint dismissed, with costs.

RICHARD MORGAN, Plaintiff, *v.* MARTIN V. B. TURNER et al., Defendants.

(Supreme Court, Clinton Trial Term, July, 1901.)

Express trust — Created by several writings — Statute of Frauds — Statute of Limitations — Invalid State tax sale cured by statute — Invalidity of patent, how attacked — Bona fide purchaser — Notice.

In an action by Richard Morgan to establish title to a lot in a tract of wild lands in Clinton county, it appeared that, in 1853, the lot was sold for taxes of 1847 and 1848, and was conveyed to the People by the State comptroller by a deed never recorded; that, in 1882, the State deeded the lot to Wales Parsons by a deed or patent recorded in Clinton county in 1882, Richard Morgan paying the whole consideration therefor; that, shortly before this deed passed, Parsons had given Morgan a mortgage to secure, as alleged, Parsons' debt for one half of the consideration; that, on Parsons' patent, there was a memorandum, signed with his initials, reading "Undivided one-half deeded Richard Morgan;" that, in 1892, Parsons, who died in 1895, wrote Morgan a letter in which he said he thought "we" could sell the lot for $4,000, and that, if Morgan would sell at that figure, "we" would give an option at that figure, and he requested Morgan to reply at once. The lands were sold, before 1895, on executions against Parsons; the defendants redeemed from the sale and also claimed under a deed from the owner before the tax sale.

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Held, that the written evidence taken as a whole created an express trust in Parsons, for the benefit of Morgan, which satisfied the requirements of the Statute of Frauds (2 R. S., m. p. 134, §§ 6 and 7).

That the Statute of Limitations was not a defense to the action, as Parsons had not repudiated the trust, and had admitted it by his letter of 1892, within ten years of the bringing of the action.

The owner, in 1847 and 1848, of the lands, which were in the town of Saranac, was then a resident of that town, but the lands were improperly assessed as non-resident, the assessors having jurisdiction of them.

Held, that the sale of 1853 was valid, as the patent to Parsons was recorded in Clinton county in 1882, and section 132 of the Tax Law of 1896 had declared that every conveyance of a grantee of the comptroller, whose deed had for two years been recorded in the office of the county where the lands conveyed were located, should be conclusive evidence that the sale and all proceedings prior thereto were legal.

The lands were within twenty miles of Clinton prison, and a sale of lands within that radius is forbidden by statute.

Held, that, as the patent to Parsons was valid on its face, the defendants could not establish its invalidity by evidence outside of it, and only in a direct action instituted for that purpose.

The answers of the defendants did not allege that they had no notice of Morgan's rights in Parsons' property, and it appeared that, when they bought of the purchaser at the execution sale, they had knowledge that Morgan had some claim.

Held, that they were not *bona fide* purchasers, and that they only acquired the half interest of Parsons.

ACTION in partition and to establish title to an undivided one-half interest in lot No. 63, township No. 4, Old Military Tract, in Clinton county. The defendants, among other things, alleged title under a deed from the owner before the tax sale mentioned in the opinion.

Shedden & Vert, for plaintiff.

S. L. Wheeler, for defendant Turner.

Riley & Healey, for defendant Riley.

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HOUGHTON, J. The plaintiff brings this action to establish title to an undivided one-half interest in lot No. 63, township 4, Old Military Tract, in Clinton county, and to partition the property.

The lot was sold for taxes in 1853, and conveyed by the Comptroller to the People. On the 13th of April, 1882, the People, for the consideration of $801 conveyed the premises to one Wales Parsons. The evidence shows that the plaintiff paid the full purchase price for this deed. Before the execution of the deed, and while negotiations for the purchase were pending, Parsons gave to the plaintiff a mortgage for $400, as the plaintiff claims, to secure one-half of the purchase price owing by Parsons. There appears upon the Parsons' deed, a memorandum signed by him by his initials, as follows: "Undivided one-half deeded Richard Morgan," this plaintiff.

The plaintiff and Parsons owned some real property together, and did business as partners in some matters. On September 22, 1892, Parsons wrote a letter to the plaintiff in which he stated that he thought they could sell the lot for $4,000, and if the plaintiff would sell at that figure they would give an option for a short time, and requesting that plaintiff reply at once.

Parsons is dead, and his widow testified that she had heard her husband and the plaintiff talking about the lot in question, but could not recollect the conversation. Plaintiff for some years paid one-half the taxes on the lot.

This is all the evidence that plaintiff produces showing how Parsons held the property, or what interest the plaintiff had in it. The complaint alleges that on the completion of the transfer in April, 1882, the agreement between the plaintiff and Parsons was that Parsons should deed an undivided one-half interest to the plaintiff, and that Parsons failed to do so, and that Parsons and plaintiff were copartners.

The first questions are: Did any trust arise from this transaction in favor of the plaintiff, and, if so, of what character? and,

If the plaintiff had any rights, are they barred by the Statute of Limitations, which the defendants plead?

The statute in force at the time of the transaction provided that no trust should arise in favor of the plaintiff by reason of his having paid the consideration for the deed, unless the title had

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been taken without his consent in the name of another, or funds had been used for the purchase of the property in violation of a trust. 4 R. S. (8th ed.) 2437, §§ 51, 52, 53 (2 R. S. m. p. 728).

The purchase was made in the name of Parsons, with the knowledge of the plaintiff, who now insists, however, that there was sufficient done by Parsons to raise, in his behalf, an express trust to one-half the lot, notwithstanding the provision of section 6 of the Statute of Frauds, that a deed or conveyance in writing, subscribed by the party creating the trust, is a necessity.

The provisions of section 7 of that statute allow the trust to be proved by any writing subscribed by the party declaring the same. 4 R. S. (8th ed.), 2589 (2 R. S. m. p. 134). But this evidence must be wholly in writing, and sufficient to show that there is a trust, and what it is. Cook v. Barr, 44 N. Y. 156; Hutchins v. Van Vechten, 140 id. 115.

In the latter case, the court says: "A trust cannot be impressed upon what appears by the deed alone to be an absolute title in the defendant, without clear proof showing a beneficial interest in another as well as its nature, character and extent, and that a failure to execute or deliver the necessary legal evidence to qualify the title is fatal to such a claim."

Is there such clear proof in writing in this case as the law demands of the nature, character and extent of the trust interest claimed by the plaintiff to have been held by Parsons for his benefit?

The case of Hutchins v. Van Vechten, *supra,* discusses the growth of the provision of the Statute of Frauds relating to the declaration of trusts, and concludes that the written evidence in that case was sufficient to establish a trust, notwithstanding the lack of a conveyance in writing, subscribed by the party declaring the same, and based its conclusion upon the amendment to the former provision of the law, enacted by chapter 322 of the Laws of 1860. That law, allowing a trust to be declared without formal conveyance, provides that the preceding sections shall not be construed to prevent any declaration of trust from being proved by any writing, subscribed by the party declaring the same.

Of course, in this case, no trust resulted by operation of law. On the contrary, the law specifically prohibited a trust arising from the payment of the purchase price. But that prohibition does not prevent the plaintiff from establishing a trust in Parsons

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to one-half the lot, if he can do so by any writing subscribed by Parsons declaring the same.

In Hutchins v. Van Vechten, *supra,* the court held that letters and informal memoranda, signed by the party, were sufficient if they contained enough to show the nature and character and extent of the trust interest. In that case the party holding the title had executed a power of attorney to the law partner of the one claiming a half interest, authorizing him to sell, accompanied by a letter stating that whatever was realized belonged to himself and the trust claimant jointly and equally, referring him to the other party for further instructions, and also a particular description of the property, designating it as "our property." There were other letters stating that although the property was wholly in his own name, yet the other party had an interest.

In the present case, Parsons made a statement upon the deed that an undivided one-half interest had been deeded to the plaintiff, and wrote the plaintiff a letter, in which he stated as follows: "I think we can sell the Saranac Pulp & Paper Company lot 63, township 4, O. M. T. I have agreed to go in and show them the same next Tuesday. I told them the price wanted was $4,000 for the whole lot. If you will sell at that rate, that we would give them an option for a short time, say thirty days. Please let me hear from you at once, and oblige."

Parsons had evidently told the probable purchaser that he owned only a part of the lot, and must consult the plaintiff with respect to the sale of the whole lot. He refers to the selling in the plural, and says that he told them that the price wanted for the whole lot was $4,000, and that if the plaintiff would sell at that rate, they would give them an option.

The declaration on the deed can be fairly interpreted as a statement, in the absence of any deed, that the plaintiff was entitled to a deed for an undivided one-half of the premises.

Do the letter and the declaration on the deed, taken together, constitute enough written evidence, subscribed by Parsons, to show that he held an undivided half of lot 63 in trust for the plaintiff? Under the authority of Hutchins v. Van Vechten, I think they do; and that the plaintiff has established that as between him and Parsons, Parsons held an undivided half of the lot in trust for him.

If there was any trust at all, it was an express one, subsisting at the time of the writing of the letter in 1892, or created at that

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time, and the Statute of Limitations did not begin to run against the plaintiff until the trustee disclaimed or repudiated the trust. Lammer v. Stoddard, 103 N. Y. 673. If I am right in my conclusion that there was a trust evidenced by the letter of September 22, 1892, certainly at that time he had not repudiated it; and the ten year statute being the only one that applied, even if it began in 1892, had not run at the time of the beginning of this action.

The defendant Turner insists that the People had no title to convey to Parsons, because the taxes of 1847 and 1848, for which the sale of 1853 was made, were improperly assessed as non-resident, the then owner being a resident of the town of Saranac, where the property was situated.

The lands were wild lands, not occupied by the owner, and the assessors of the town of Saranac had jurisdiction, in some manner, to assess the land. The defendant says he is not prevented by the statute from attacking the sale, because the deed from the Comptroller to the People was never recorded in Clinton county, which is a prerequisite to set in motion the limiting acts of 1885 (ch. 448), 1891 (ch. 217) and 1893 (ch. 711). As finally amended, the limiting act (L. 1896, ch. 908, § 132) provides that "Every such conveyance heretofore executed by the comptroller, county treasurer or county judge, and all conveyances of the same lands by his grantee or grantees therein named, which have for two years been recorded in the office of the clerk of the county in which the lands conveyed are located * * * shall be conclusive evidence that the sale and proceedings prior thereto" were according to law, unless action or proceeding be taken within one year from the passage of the act to annul or overthrow it. The primary object of the Legislature was to protect the State in its titles acquired through tax sales and conveyances which it may have made by virtue thereof. The deed which the State gave to Parsons was recorded in Clinton county in 1882, long prior to the passage of the act, and recited that the patent was given to convey all the title which the People acquired to the lands in dispute, by virtue of the tax sale of 1853. There is no evidence showing there was no deed from the Comptroller to the State, but only that whatever deed there may have been was not recorded in Clinton county.

The recording of the deed of Parsons, the grantee of the Comptroller, for more than two years, I think satisfies the statute, which

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particularly says, that not only every conveyance executed by the Comptroller, county treasurer and county judge, but also all conveyances of the same lands by his grantee, which shall have been recorded shall be deemed conclusive. The statute is one of limitation, and the original owner and his grantee had reasonable opportunity to attack the sale; and the Legislature had the right to declare that the deed of the People, after a certain period, should not be open to attack on the ground that the sale was improperly had, or that the assessors having jurisdiction to assess assessed improperly. Meigs v. Roberts, 162 N. Y. 371; Marsh v. Ne-ha-sa-ne Park Association, 25 App. Div. 34. The defendants are not, therefore, in position to question the manner in which the lands were originally assessed, nor to avail themselves of their adverse title.

The further point is made that the lands in question are within twenty miles of Clinton Prison, and that the letters-patent issued to Parsons are void because a sale of lands within that radius of the prison is prohibited by law.

The situation of the land with respect to the prison, required evidence outside the patent, which was valid upon its face, and the rule is, that the invalidity of a patent cannot be established in this manner, or in a collateral proceeding; but can be voided only in a direct proceeding or action for that purpose. Blakslee Manufacturing Co. v. Blakslee's S. I. Works, 129 N. Y. 155; N. Y. C. & H. R. R. R. Co. v. Aldridge, 135 id. 92.

Prior to Parsons' death, in 1895, judgments were obtained against him, and an execution issued, and the land in question was sold. The defendants redeemed from that sale, and claimed to have acquired title to the entire lot by virtue of that redemption and conveyance from the purchaser at the sheriff's sale. The answers of the defendants do not allege the acquiring of title in this manner by them, nor do either of them aver that the purchaser at that sale had no notice of the claim of the plaintiff to one-half part. The legal title was in Parsons, and upon the record he was the owner of the entire lot. It is very likely that the purchaser upon such a sale, without notice of the claim of the plaintiff, would obtain title to the entire property. It is questionable whether or not the pleadings are sufficient to enable the defendants to show that the original purchaser stood in this relation. The character of purchaser under the statute is an inde-

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pendent one, and it is necessary for him to plead and prove not only that he was a purchaser of record, but that he was a purchaser in good faith, and for a valuable consideration. He is bound, therefore, to deny, by his answer, notice, although notice is not charged against him, and to prove it, because these are new matters and in defense. Seymour v. McKinstry, 106 N. Y. 242. There is an entire absence of proof that the original purchaser at the execution sale did not know of the claim of the plaintiff to one-half of the lot, except that the plaintiff himself says he was not present at the sale, and did not give such notice. But, an answer to it all is that the defendants themselves knew of the plaintiff's claim at the time they purchased the rights acquired under the execution sale, or, at least, had enough knowledge as to some claim of the plaintiff to put them upon inquiry, and to destroy their character of *bona fide* purchasers, without notice, as to the one-half interest of the plaintiff. By such purchase they, therefore, acquired only the half owned by Parsons. The letter of Riley to the plaintiff shows that he had knowledge that the plaintiff made some claim with respect to the lot, and was endeavoring to adjust it, and Turner was notified by the plaintiff himself, before he made his purchase, that the plaintiff claimed one-half.

If I am right in my conclusions, the plaintiff is entitled to the decree asked for in the complaint, with costs.

A decision and judgment may be submitted accordingly.

Judgment for plaintiff, with costs.

THE PEOPLE ex rel. E. BRAYTON GUERNSEY, Relator, *v.* HENRY B. PIERSON et al., Composing the Board of Officers of the Town of Ellisburg, Respondents.

(Supreme Court, Jefferson Special Term, July, 1901.)

Election at a town meeting held by districts — Town law governs — Irregularities not fatal.

An election at a town meeting, in a town where such meetings are held by districts, on a day other than a general election day is not governed generally by the Election Law (L. 1896, ch. 909), but mainly by the Town Law.

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The town canvassing board cannot be directed to convene, recanvass the votes cast at such an election (on the local option questions), and, in so doing, reject, for irregularities, returns from certain districts, unless the returns attacked are wholly void.

Where the people of a town have expressed their will at an election, it should not be overridden because of the negligence and carelessness of the town officers.

The following deviations from the Town Law (L. 1890, ch. 569, § 38, renumbered, and amended by L. 1899, ch. 168, § 2), were regarded by the court as not fatal:

That, in two districts, the inspectors selected one of their number as poll clerk;

That, in some districts, the poll lists were not subscribed as required by the statute;

That, in one district, the inspectors did not return how many ballots were void, it appearing that the void ballots were inclosed by them in a sealed package and filed with the statement of the canvass;

That, a supervisor of the town, who took no part in the canvass, was present at it and signed the statement of it.

APPLICATION for a peremptory writ of mandamus directed to the defendants composing the board of canvassers of the town of Ellisburg, requiring them forthwith to convene as a board of canvassers at the office of the town clerk in the town of Ellisburg and recanvass the votes upon the questions submitted under the Liquor Tax Law at the town meeting held in said town on the 19th day of February, 1901, from the statements of the inspectors of the several election districts as delivered to them on or about the 20th day of February, 1901, and to reject, throw out and wholly disregard the statements and returns from the first, second, third and fifth election districts, and from any other, if any, in which the said election was not legally conducted by a properly constituted election board, and directing the defendant Hallett, as town clerk, to enter the result of such recanvass in the minutes and in the town records, as required by law in case of the original canvass of the votes of a town meeting; and further directing the said town clerk to immediately file with the State Commissioner of Excise, and also with the county treasurer of the county of Jefferson, a certified copy of the statement of the result of the vote as corrected by such recanvass.

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Arthur L. Chapman, for motion.

Mason M. Swan and A. O. Briggs, opposed.

ANDREWS, W. S., J. It seemed to have been assumed upon the argument of this motion that the General Election Law of the State (L. 1896, ch. 909) is applicable to such an election as is here called in question. I doubt if this is so. Sections 18, 58, 63, 85, 86, 87, 111, 113, and perhaps others of this statute refer to, and to some extent regulate or affect town meetings not held on general election days; but such meetings are governed entirely by the Town Law (L. 1890, ch. 569), except in so far as this latter act incorporates into itself the provisions of the former statute. Matter of Larkin, 163 N. Y. 201. At town meetings the justices of the peace preside, and the town clerk acts as the clerk. A poll-list and minutes of the meeting, subscribed by the clerk and the presiding officers, are to be kept and filed in the town clerk's office. If, however, there is no general meeting and the town is divided into districts, the election inspectors in each district appoint a poll clerk and they and he have the same powers and duties as the justices and town clerk at general meetings.

When an election is held under such circumstances, at the close of the polls the inspectors canvass the ballots and make a statement of the number cast for each candidate and for or against every question or proposition. "The void and protested ballots, and the voted ballots other than void and protested shall be preserved and disposed of by the inspectors in the manner provided by section one hundred and eleven of the election law." L. 1899, ch. 168, § 2, amending Town Law, § 38. That is, they shall be enclosed in a sealed package and filed with a statement of the canvass. This statement is to be in the same form as statements made by inspectors at general elections. Its form is, therefore, fixed by the same section 111 and by section 84. There is to be first a return of all the ballots voted and the number voted for each candidate or proposition; the number of ballots "marked for identification" shall be given, and also the number of ballots rejected as void. At the end shall be a certificate that the statement is correct. It is then to be delivered to the justices of the peace of the town and the town clerk, who shall convene and act as a town canvassing board.

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The form of questions in regard to the sale of liquors, the way in which such questions shall be submitted and the manner in which ballots are to be prepared and furnished are regulated by section 16 of the Liquor Tax Law (L. 1896, ch. 112).

In determining whether or not this is a proper case for granting a peremptory writ of mandamus only those facts contained in the relator's papers which are undisputed may be considered. On the other hand all the relevant facts stated in opposition to the motion, and properly pleaded, are deemed to be true.

It appears that the relator is a resident of and a hotel-keeper in the town of Ellisburg, Jefferson county, and that until May 1, 1901, he was authorized to traffic in liquors in said town as a hotel-keeper under the Liquor Tax Law of the State. On May eighteenth he applied to the county treasurer for a further certificate authorizing him to continue such traffic in liquors for the year ending May 1, 1902, but such application was refused. It further appears that the town of Ellisburg is divided into five separate election districts, and that at a town meeting held on February 19, 1901, the local option questions set forth in the Liquor Tax Law were properly submitted to the electors of the said town. As a result of such election and canvass made of the votes cast thereat the town clerk filed with the State Commissioner of Excise and with the county treasurer of Jefferson county, a certificate purporting to show that the majority of the votes upon all the questions so submitted was in the negative. It was in reliance upon this certificate that the application of the relator was refused by the county treasurer. Thereupon the relator makes this application claiming that the said election was, in many respects, irregular and that the canvass of votes made thereat, both by the district inspectors and by the town canvassing board, failed to comply with the statute.

In view of the decision of the Court of Appeals as to the law controlling town elections many of the objections as to the acts of the election inspectors become immaterial. But certain irregularities do appear. Perhaps the most important are the following:

1. The statute (L. 1899, ch. 168, § 2) requires the appointment of a poll clerk in each election district who is required to keep a poll list. The office of these clerks is distinct from that of the inspectors, and the intention of the law is that the two offices shall not be combined in the same person. Yet in two of the districts,

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at least, the inspectors selected one of their own number to act as poll clerk.

2. A poll list should be kept by the clerk and this list, subscribed by him and by the election inspectors, is to be kept and filed in the town clerk's office. These lists seem to have been made, but in some instances, at least, they were not subscribed in the method designated.

3. In the second district of the town this poll list shows that 228 persons voted upon the excise question. In the returns made by the inspectors less than that number of votes are accounted for. On the fourth question, for instance, which is the one in which the relator is interested, the returns show 113 votes "Yes" and 77 votes "No," making a total of 190. No statement was made as to the missing 38 votes. But it appears from the affidavits presented on this motion that these 38 were blank and void. If so, the number of void ballots, at least, should be stated.

4. The town canvassing board consists of the justices of the peace of the town and the town clerk. One of such justices was not present at the canvass of the votes, but there was present one J. P. Wodell, the supervisor of the town. He, however, took no part in the canvass except to sign it as supervisor.

This being the condition of affairs, the relator claims that he should not be deprived of his right to traffic in liquors; while on the other hand the defendants claim that, whatever irregularities may have been committed, the people of the town have expressed their will and that the result should not be overridden because of the negligence and carelessness of the town officers. I agree with the defendants and think that the application should be denied.

The matters complained of do not enter into the essence of the election. They are matters of procedure concerning which the statute gives directions. The failure to comply with these directions, however, does not render the election void.

The relief asked for is that the town canvassing board be directed to convene and recanvass the votes, and upon such recanvass reject and disregard the returns from certain districts in which these irregularities occurred. This cannot be granted unless the returns complained of are wholly void. Otherwise the canvassing board has done its full duty. They are to canvass the returns made to it. They have no power to recall the inspectors and compel them to correct irregularities. If they met again they

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could only repeat what they have already done. As has been said, in two districts supervisors were elected to act as poll clerks. This was an irregularity, but the office was filled and the duties of the office were performed. The person so acting was, at least, a *de facto* officer, and the fact of his so acting seems to have cast no uncertainty on the result.

The poll lists also were not properly subscribed. But with them the town canvassers had nothing to do. If they were wholly lacking it would have been still their duty to have canvassed the vote upon the returns made by the inspectors.

So in regard to the void ballots. Apparently, such ballots were inclosed, as the statute directs, in a sealed package and filed with a statement of the canvass. The failure of the inspectors to state in their return how many were void does not affect in any way the certainty of the result and should not be used as a pretext for overriding the express wish of the electors of that district.

The fact that the signature of Mr. Wodell was attached to the canvass made by the town board is immaterial. He was not a member of that body, but his presence in the room while they were performing their duties, and the addition of his signature to their certificate, does not vitiate their action.

The application for a mandamus is, therefore, denied, with ten dollars costs.

Application denied, with ten dollars costs.

JOSEPHINE DISLER, Plaintiff, *v.* JAMES J. McCAULEY, Defendant.

(Supreme Court, Kings Special Term, July, 1901.)

Bankruptcy — Does not release a judgment for breach of promise of marriage, including a claim for seduction under the promise — Code C. P., § 1268.

A discharge in bankruptcy does not release a judgment for $3,000 recorded against the bankrupt for breach of promise of marriage where the complaint in that action also alleged seduction under such promise and there was proof that the plaintiff therein had a child, as it may fairly be assumed that a part of the damages were given for

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the seduction, and seduction is a willful injury to the person, within the clause of the Act of 1898 (chap. 3, § 17), excepting from release judgments recovered "for willful and malicious injuries to the person or property of another."

MOTION for the cancelling and discharge of record of a judgment.

Davis & Kaufmann, for plaintiff.

Burr, Coombs & Wilson, for defendant.

DICKEY, J. This is a motion for the cancelling and discharge of record of a judgment. The motion is made under section 1268 of the Code of Civil Procedure, which provides if it appears upon the hearing that a bankrupt has been discharged from the payment of the judgment, an order must be made directing said judgment to be cancelled and discharged of record.

The Bankrupt Law, section 17, provides "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (2) are judgments in actions for frauds or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another."

While in form and in name this action was one for breach of promise to marry, the complaint properly included an allegation of seduction under promise of marriage. Proof was given of the seduction and birth of a child, and damages were given in the sum of $3,000. It may fairly be assumed that at least a part of these damages included in the judgment herein grew out of and were given because of the injury to the person covered by the seduction part of the complaint. This being so, can it be said that the judgment and no part of it is one for willful injury to the person?

The action for breach of contract to marry is not like any other action for breach of contract, and is not to be classed with the ordinary action for breach of contract, because the law permits recovery, in an action for breach of contract to marry, for damages done to the person peculiar to that breach of contract and not common to other breaches of contract — exemplary or punitive damages. So breach of contract of marriage cases, including as they

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may a tort to the person, may well be classed and included among actions for willful injury to the person.

To my mind Congress never intended to discharge bankrupts from liability for damages such as are included in this judgment. The purpose of the bankrupt act was to relieve failing honest debtors from their money obligations, and not to free tortious debtors from liability for their wrongs. In our Code of Civil Procedure, section 3343, subdivision 9, seduction is expressly named as among personal injuries. While our statutes do not give a right of action directly, as some other States do, to the injured female for seduction alone, yet there is the right in connection with the breach of promise to marry to plead and prove that there was a seduction, and this element permits and calls for an enhancement of damages beyond the damages only for a breach of promise to marry; and any judgment in such a case necessarily includes within it damages for the personal wrong. So much of the judgment for the personal wrong is not any less such a judgment because the action by general designation is called one for breach of promise to marry.

The spirit of the Bankruptcy Law is to govern. This bankruptcy proceeding was evidently taken to discharge this very judgment, because the bankrupt owed practically nothing besides. There would be little use in bringing actions of this character if the judgment obtained might be speedily discharged by going through the form of bankruptcy proceedings. This should not be encouraged.

Motion denied, with ten dollars costs.

FREDERICK REISERT, Plaintiff, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, Kings Special Term, July, 1901.)

Measure of damages — For agricultural lands on Long Island deprived of natural water by Brooklyn pumping system — Special damages — Injured person to make loss small as possible — Fraud.

In an action for damages caused to Long Island agricultural lands by the lowering of their water level through the action and suction of the pumping system of the borough of Brooklyn, the measure of

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general damages is the difference between the reasonable value of such lands with and without their natural water.

The rental value is not a proper measure of damages where lands are not commonly rentable.

Special damages may be recoverable but are dependent on the circumstances of each case.

Where a pumping system has been in operation for many years and has affected such lands permanently and injuriously, their owner is not justified in continuing to work them, and then attempt to make the city of New York pay him special damages for the labor, skill and expenses of cultivation which he lost during all the years of cultivation for which recovery was possible.

Excluding the value of the labor and skill of the owner and adding taxes, the value of the annual use of such lands is somewhere between three and five per cent. of the sale value, and, accordingly, where the owner of such lands, worth $6,500, claimed damages of the city of New York for $75,000, the court considered the claim untenable and as indicative of fraud.

ACTION for damages to plaintiff's land in Nassau county, resulting from the lowering of the water level by the defendant's pumps.

James C. Van Siclen, for plaintiff.

R. Percy Chittenden, for defendant.

MAREAN, J. In the class of cases to which this belongs, the true measure of damage is the difference between what the use of the land is reasonably worth deprived of its natural water, and what it would have been reasonably worth with such water. That is the measure of general damage. See 3 Sedg. on Dam., §§ 941, 942, and cases cited.

Special damage may in some cases be recoverable. No rule can be laid down for special damage; each case depends on its own circumstances. If the subtraction of the water is made without warning while a growing crop is on the way, the value of the use of the land will not necessarily measure the loss. If the crop be wholly destroyed, the owner not only loses the use of his land for the year, but in addition his labor and expenses. If it is not

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wholly destroyed, but only diminished, the value of the land for the year disappears as an element of damage, and the entire loss (which may be more or less than the value of the use of the land) is best ascertained by inquiring how much less the crop was worth when gathered than it would have been but for the subtraction of the water.

While the injury in these cases is theoretically not permanent but continuing, nevertheless after the system of pumping has been established, each agricultural year opens with a practical certainty that the injury is to continue during that year, and the landowner has no right to purposely incur special damages and expect the city to pay them. His general damage for the year he has a right to; the difference between what the use of the land is worth for any purpose and what it would have been worth if not deprived of the water, he should recover. But, if he cultivates the land and the returns which he realizes are not sufficient to pay his labor and expenses, and in addition the value of the use of the land, he owes his loss in that respect to his own folly. If some trespasser builds a railroad across my land, and I throw myself in front of his approaching train, I cannot recover for my injuries. The injured owes even the wrongdoer a duty to minimize the damage; and especially is that true when the trespasser is pursuing a laudable purpose of purely public good, and there is a grave question whether his action is a legal wrong at all.

It may be that the landowner in these cases has a right to more than one year's experiment in the culture of his land without the water before he should be held to have wantonly incurred special damage; but that question does not arise here, for something like ten years had elapsed in this case after the pumping commenced, prior to the first year for which the right to damages is not barred by limitation.

The proof by which the recoverable general damage may be established does not seem to be well understood.

If such lands were commonly rented, the ordinary rentals would furnish a perfectly simple and reliable means of fixing the damage. But they are not.

Of course evidence of the extent of the actual subtraction of water is competent, and evidence also of what the land is capable of producing on one hand with the water, and on the other hand without the water. Such facts lay some foundation, more or less

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unsatisfactory, of course, for an opinion by experienced cultivators as to the annual value of its use — *meaning by that what rent one actually desiring to rent could afford and would probably be willing to pay,* not losing sight of what such lands could be bought for out and out. But this class of evidence should be limited to *quantity and quality of products,* and the other side of the account should be limited to *quantity* (as distinguished from cost) *of labor, seed and fertilizers* required for the production. *The actual history in any respect of any particular year, either before the water was taken or since, should not be allowed to be proved* (on the question of general damage), because not only is an issue thus presented in which the defendant is utterly at the mercy of the unscrupulous plaintiff, but the issue is wholly irrelevant; for whatever annual return the figures may show, a large part of it must be deemed the fruits of the proprietor's labor and skill and not of the land, and the value of the use of the land is not arrived at, but only the value of the use of the land in combination with the proprietor's skill and attention, which last is an uncertain and undeterminable factor.

The value of the land in question for the purposes of sale and purchase with the water on one hand, and permanently deprived of it on the other, is the safest and most reliable basis for a conclusion as to general damage. Such value will not in any case be difficult of proof and it keeps in view and takes account of all possible uses to which the land might be applied instead of being confined to the single particular use which the owner had been accustomed to make of it.

There is not a foot of agricultural land on Long Island, whether enjoying its normal water or deprived of it, the annual use of which is worth more than 5 per cent. or less than 3 per cent. of its sale value, in addition to taxes. All in excess of 5 per cent. and taxes which it may be made to produce is the fruit of the proprietor's labor and skill.

It is matter of common knowledge that money can always be invested without risk, so as to return 3 per cent. net. However, agricultural land on Long Island may be deprived of water, if it has nevertheless a sale value, its use is worth for some purpose 3 per cent. at least of that sale value, besides taxes. Because the purchaser, for the use of it each year, forgoes at least 3 per cent. interest on his purchase money and pays the taxes.

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It is another matter of common knowledge that money cannot be invested in real estate as near the city of New York as any part of Long Island, or in any other entirely save investment near home, so as to produce, one year with another, without the proprietor's personal attention, more than 5 per cent. and taxes. Any land on Long Island which with reasonable certainty will produce that return will find a ready and eager purchaser. Capital in New York has a keen scent for a near-by 5 per cent. investment. If any property on Long Island could, without the personal attention of the owner, with reasonable certainty, be made to yield more than 5 per cent. per annum on its sale value it would soon be so sought after that its sale value would be enhanced to a point where the net return would be no more than 5 per cent.

Given then in any case the sale value of agricultural land on Long Island, the value of its annual use is somewhere within the range of from 3 to 5 per cent. of that value, plus taxes. All else that it may in fact be made to produce must be regarded not as the fruits of the land, but of the personal efforts and skill of the proprietor.

The truth is that the annual use of no form of income producing property, free from substantial risk, is in these days and in this part of the world, and without the personal attention of its proprietor, worth more than 5 nor less than 3 per cent. of its value. If it falls below 3 per cent., the disposition to sell will be in excess of the disposition to buy, and prices will fall till a return of something more than 3 per cent. is reached. If it rises above 5 per cent. the contrary happens, resulting in a return to 5 per cent. or something less.

Any farmer who recovers against the city in cases of this class upon a basis of annual value in excess of 5 per cent. of sale value will have accomplished a manifest fraud.

In this case the plaintiff paid $6,500 for his farm. There is no reason to believe it has since increased in value and the plaintiff gave no evidence that its sale value has decreased. Three hundred and twenty-five dollars and taxes is the uttermost limit of its annual value before the water was taken and there is no evidence to warrant a conclusion that its use since then for some purpose has not been that sum.

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The plaintiff's farm was worth only $6,500, yet he comes into court seriously claiming damage to the amount of $75,000, as if any legitimate damage could exceed that which would have resulted from a complete destruction of the land. It is impossible to contemplate such a claim without that instinctive hostility which every attempt to deceive the court, and by its aid work out a fraud, deserves.

I have not deemed it necessary to cite authorities in support of the specific views which I have expressed. It is enough that they must commend themselves to the rational mind. It seems to be considered in some quarters that judges should not think any more on their own account; that they should spend their lives mousing through mouldy libraries in search of what other judges in a less enlightened age have said, not even upon the immediate question in hand, but upon some matter more or less distantly related. It is thought to be presumption to let one's own bucket down into the living well of reason, instead of being content to lick up from the muddy, trampled earth around it the green and stagnant leakage of the past. And so the science of law, which was once deemed the perfection of human reason, is being left behind by every other science.

The last word has not yet been said on any subject.

Judgment for nominal damages, without costs and without injunction.

Judgment accordingly.

EUGENE F. BEECHER, Plaintiff, *v.* THE PRESS PUBLISHING CO., Defendant.

(Supreme Court, Kings Trial Term, July, 1901.)

Libel — New trial after an appeal.

Upon an appeal from a judgment for the plaintiff upon the first trial of an action for a libel alleged to have charged the plaintiff with having dishonorably kept his aged father's securities, and in which only general damages were claimed, the Appellate Division decided that as the trial justice had held the publication not libelous *per se* he should have directed a verdict for the defendant, that the innuendo charged in the complaint, not being one which could be drawn from

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the publication, was insufficient, and that the publication was not libelous *per se*. Upon a second trial the justice left it to the jury to say whether the publication imported the charge alleged, told them that if the charge alleged was made and was false the plaintiff had a right of action, permitted them to find, if an innuendo was necessary, that the one stated in the complaint, larceny, would cover a milder charge of the same nature, and instructed them that an innuendo was of little use provided the fair import of the words brought the minds of readers to the hurtful conclusion. The jury found for the defendant.

Held, that a motion to set aside the verdict must be denied as the jury must have found the publication not libelous, or that the facts proved justified the charge made.

MOTION to set aside a verdict in an action for libel.

H. S. Worthley, for plaintiff.

Bowers & Sands (J. W. Gerard and M. L. Towns, of counsel), for defendant.

RUSSELL, J. The plaintiff moves to set aside the verdict of the jury rendered for the defendant in his action for libel on account of a publication in the New York World. On a previous trial a verdict was given for the plaintiff for $4,000. This verdict was set aside and a new trial directed on appeal by the Appellate Division. Beecher v. Press Publishing Company, 60 App. Div. 537. The Appellate Division held that, as the trial justice charged the jury that the article was not libelous *per se*, he should have directed a verdict for the defendant; that the innuendo charged in the complaint being one which could not be drawn from the article was insufficient; and, at the close of the opinion, approved the principle as applicable to the case that the publication was not a libel *per se*.

Accordingly it became a serious question for the Trial Court upon the new trial as to whether, under the rules laid down by the Appellate Division, the case should go to the jury at all. But it seemed better by the court to take the verdict of the jury in order to end the litigation if possible. In rendering their

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verdict the jury must have found that the article was not libelous, or that whatever was hurtful to the real character of the plaintiff was justified by the facts proved upon the trial. Therefore, it would be in derogation of the decision of the Appellate Division to set aside a verdict for the defendant, and thus rule that as a matter of law the jury should have found some damages by way of compensation for a substantial injury to the real character of the plaintiff in the publication of the article.

The publication was made in the *World* November 14, 1899, and is as follows:

"EDWARD BEECHER'S BIG HEART.

"There were many who regarded old Dr. Edward as the best and greatest of the Beecher family — the biggest-hearted and broadest-minded.

"Fifteen of these admirers, including the Rev. R. R. Meredith, Pastor of the Tomkins Avenue Congregational Church, and S. V. White, of Wall Street fame, gave one hundred dollars each, annually, to Dr. Beecher's support.

"At that time, early in the '90's, the only inmates of the Beecher house, in Macon Street, were the Doctor, his wife and their adopted daughter.

"EUGENE F. BEECHER.

"Eugene F. Beecher, a younger son, married a wealthy Brooklyn girl and lived in a handsome house in Brooklyn; Frederick W. Beecher, the elder brother, was at that time a Presbyterian minister presiding over a church in the northern part of the state.

"'Come to see me at once,' wrote the old Doctor to Dr. Meredith one day, 'I am in sore trouble and need your advice.'

"Dr. Meredith lived at No. 97 McDonough Street, only a short distance from Dr. Beecher's house.

"Within ten minutes of the receipt of this alarming message the kindly pastor of Tomkins Avenue Congregational Church was with his old friend.

"Dr. Beecher then explained that his son Eugene had obtained possession of certain valuable securities belonging to him and had refused to return them.

"Investigation revealed the fact that Dr. Beecher had fallen heir to considerable property, including the Macon Street house, on the death of a relative.

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"EUGENE RETURNED SECURITIES.

"Dr. Meredith handled Eugene Beecher without gloves. In a letter to the young man, Dr. Meredith gave him a choice of alternatives in words like these:

"'Return those securities to your father within twenty-four hours or get out of Brooklyn. You can't keep them and continue to live in this City, where your family has held an honorable and distinguished position.'

"The securities were returned. They were all turned over to S. V. White, who handled them to the best advantage for Dr. Edward Beecher, releasing the faithful coterie from further donations."

The court, upon the second trial, left it substantially to the jury to say whether the article intended to charge, so that people of ordinary comprehension would so understand it, that the plaintiff had kept possession of his aged father's securities in a dishonorable way and that if such was the fair import of the article the statements and suggestions, if untrue, afforded a right of action, because the sting to character may thus be as assuredly inflicted as by a more bold and direct assertion. The court also allowed the jury to find, if an innuendo in the complaint was necessary at all, that the one stated in the complaint that the crime of larceny was intended, as the greater included the less, would cover a milder charge of the same generic character; and also that, under our system of pleading, based upon the cardinal idea of having the facts pleaded and allowing the inferences from those facts to be drawn by the silent operation of the law, an innuendo was of little use, provided the fair and natural import of the words of the libelous article brought the minds of the readers to the hurtful conclusion. Otherwise, we would magnify the force of a pleading beyond its real reason and occasion, and put technical rules, however hoary they had grown by age, above the results of substantial justice.

It will thus be seen that the trial court went as far as proper deference to the opinion of the Appellate Division would allow, and that the jury has pronounced against the plaintiff in his claim that substantial hurt has come to him by this article. I cannot hold there was no defense except a diminution of damages.

After the serious consideration of the evidence relating to a

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charge of substantial injury to character, it would be grotesque to give deliberate attention to a claim for six cents damages and six cents costs on the plea of the right to a nominal verdict; nor do I understand that counsel for the plaintiff asks that this court shall do so. Motion for new trial denied.

Motion denied.

MAGGIE DIXON, Plaintiff, *v.* THE BROOKLYN HEIGHTS RAILROAD CO., Defendant.

(Supreme Court, Kings Trial Term, July, 1901.)

Negligence — New trial for concealment of a hernia caused by an accident.

Where a woman, injured by a railroad accident and examined twelve days later by the company's surgeon, then makes no reference to any injury in her groin, and yet claims upon the trial of her action against the railroad company, more than eighteen months after the accident, that she has a large hernia, caused by the accident, then begun and which has since continued to increase, a verdict in her favor for $3,500 will be set aside upon the ground of the surprise to the defendant at the first proof of such a serious injury, and this although the complaint alleged that the plaintiff had sustained serious and lasting bodily injuries, injuries to her head, limbs and nervous system, and internal injuries.

MOTION for a new trial upon the minutes.

Morris & Whitehouse, for plaintiff.

Sheehan & Collin, for defendant.

RUSSELL, J. The motion for a new trial upon the minutes does not reach the question as to the right of the plaintiff to recover some compensation. It is rightly placed upon the ground of surprise on account of the character of the claim of serious injury, first made known to the defendant upon the trial, and the effect of which could not be wholly realized until the verdict of the jury was pronounced. That verdict was for $3,500, an amount which might be considered excessive but for the claim

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that hernia was produced by the accident, of which claim it was apparent the defendant could have no reasonable anticipation, partly an account of a fair assumption from the conduct of the plaintiff herself that the injuries for which compensation was demanded were of a different resulting character.

The charge in the complaint averred that plaintiff had sustained "Serious and lasting bodily injuries, and injuries to her head, limbs and nervous system, as well as internal injuries". The manner in which the reference to internal injuries was added to the primary ones alleged might reasonably induce the defendant to believe that no specific troubles of the internal system could be averred. That complaint was verified the 5th day of January, 1900, the accident occurring the 25th of October, 1899.

Twelve days after the accident the plaintiff was examined by the surgeon for the railroad company, at which time she told the surgeon the kind of injuries under which she suffered. She made no reference whatever to any injury to her groin, although she testified upon the trial that such an injury began immediately after the accident, and continued to increase. If this surgeon had insisted upon examining her whole person he would have transgressed his province, and proceeded with a degree of indelicacy which no information from the plaintiff would have justified. Had the railroad company been apprised thereafter of any claim or suspicion that the serious injury of hernia had been caused by the accident, steps could have been taken to have procured a farther examination, so that the defendant would not have been rendered practically helpless to meet this important issue upon the trial.

A fair inference that the plaintiff intended to conceal the most serious basis of her claim for compensation, until displayed upon the trial, arises from her acts adverted to, and from the nonproduction of the physician who attended her in her illness, as well as from her not procuring any examination of the hernia by a physician until ten days before the trial, being more than one year and a half after the accident. The physician who attended her during the time she claimed to have been ill from the accident was not advised by her of the serious hernia which she testified to until three weeks before the trial.

The presence of a large hernia more than a year and a half after the accident may be deemed to have been established by

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the testimony of Dr. Bishop, called as a witness by the plaintiff. Whether it came from the accident depended upon the testimony of the plaintiff herself. To make her testimony, giving her credit for a willingness to tell the entire truth, sufficient to justify an award of damages for the injury of hernia as a proximate result from the injury sustained at the time of the accident, it was necessary that she should have shown conscious perception from the occurrence to the time of her testimony of the origin, continuance and result of the swelling in the groin from her own bodily sensations and personal observation. Therefore, if the appearances were so trifling that she did not think it necessary to mention them to Dr. Riggs twelve days after the accident, or to her attendant physician for the weeks and months during which she sought his help, they are certainly insufficient to furnish reliable proof from her testimony that a hernia as large as an orange, existing a year and a half after the accident occurred, came from that accident itself, and so furnished just cause for very considerable compensation to her from the railroad company.

The interests of justice require that a new trial should be had and the omission to ask to withdraw a juror before the rendition of the verdict, under the circumstances of this trial, is no bar in the way. Tyler v. Hoornbeck, 48 Barb. 197; Continental Bank v. Adams, 67 id. 318.

Upon a new trial, if the claim of the plaintiff is right, she can maintain successfully her demand for damages to their full extent, and the defendant will have a fair opportunity to meet that claim as now displayed. Motion for a new trial granted upon payment of trial fee and trial disbursements.

Motion granted upon payment of trial fee and trial disbursements.

THE PEOPLE ex rel. FREDERICK C. KUEFER, Relator, v. THE SUPREME TENT OF THE MACCABEES OF THE WORLD, Respondent.

(Supreme Court, Monroe Special Term, July, 1901.)

Benefit order — Membership — Status of a director in a corporation.

A director of a corporation manufacturing and selling malt liquors is not within the prohibition of the laws of a fraternal order making

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ineligible to membership therein any person who "is engaged either as principal, agent or servant in the manufacture or sale of * * * malt * * * liquors as a beverage," as a director is in no sense the principal, agent or servant of his corporation in the transaction of its business.

APPLICATION for a writ of mandamus.

James M. E. O'Grady, for relator.

Love & Quackenbush, for respondent.

NASH, J. The question here is whether the relator "is engaged either as principal, agent or servant in the manufacture or sale of spirituous, malt or vinous liquors as a beverage."

The relator is a stockholder and one of the directors of the Miller Brewing Company, a corporation engaged in the manufacture and sale of malt liquors.

It is conceded that as a stockholder of the corporation the relator is not within the prohibition of section 142 of the laws of the Knights of the Maccabees, which provides that no person shall be eligible to membership in the order who is engaged either as principal, agent or servant in the manufacture or sale of spirituous, malt or vinous liquors as a beverage.

"The individual shareholders of a corporation aggregate have no implied authority to represent the company for any purpose, or to interfere with the management of its business in any respect. But it is implied that the majority present at a regularly called shareholders' meeting shall exercise a general supervisory power over the corporate affairs, and shall have authority to appoint the board of directors, or other agents who have the active management of the company's business in their charge." Morawetz Corp., § 503.

The directors of a corporation have no implied authority to act singly; they can act only as a board. Either all must be present at a meeting, or the meeting must be called in a regular manner and all the directors given notice; and in the latter case, if a majority assemble they may act by a majority vote. A majority of the directors form a quorum in the absence of a different regulation, and a majority of the quorum determine the action of the board. Morawetz, § 531.

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A director has no greater authority or power to act individually for a corporation than a stockholder. A director taking part in meetings of the directors is no more a principal, agent or servant in the management of the business of the corporation than is a stockholder who takes part in the meetings of the stockholders. Neither can be regarded in any sense as a principal, nor as agent or servant in the transaction of the business of the corporation.

If it was intended to exclude from membership the directors or officers of a corporation not directly engaged in the transaction of its business the by-laws should have said so. If there were an ambiguity in the phrase defining eligibility to membership, it would be resolved against the respondent. But there is none. Within the well-settled rules applicable to the relations existing between the directors and the body corporate, the relator individually in his capacity as director of the Miller Brewing Company cannot be regarded as either a principal or the agent or servant of the corporation.

Findings awarding the writ in accordance with the prayer of the petition may be submitted.

Writ granted.

THE VILLAGE OF FULTONVILLE, Plaintiff, *v.* THE FONDA WATER-WORKS COMPANY, Defendant.

(Supreme Court, Montgomery Special Term, July, 1901.)

Condemnation — Corporation organized to prevent a village from condemning a necessary water supply — Corporate property when not devoted to the public use — L. 1890, ch. 566, art. 7.

Where a village, in need of a water system, has duly voted and bonded itself for one and filed a map and plans therefor, in the proper offices, embracing the only adequate supply existing in the immediate vicinity of itself and of an adjacent village, it cannot, in equity, be prevented from condemning the lands containing the supply upon a disagreement as to price with a corporation organized, under the Transportation Corporations Law, in the other village, as alleged, to supply it with water, and which has bought the said lands, where it appears that that corporation has filed no map of them under the

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statute, has entered into no valid contract with its village binding it to supply that village with water, has, therefore, in no manner devoted the lands to the public use, and that the corporation was organized, two months after the first named village had filed its map and plans, in order to thwart it from acquiring the water supply.

CONDEMNATION proceedings.

G. M. Albot, A. J. Nellis and R. B. Fish, for plaintiff.

J. S. Sitterly, B. D. Smith and H. V. Borst, for defendant.

HOUGHTON, J. In October, 1900, the plaintiff by special election voted to appropriate the sum of $50,000 for the establishment of a water system for its inhabitants. A committee of its board of trustees was empowered to employ an engineer to devise plans and superintend the construction. Surveys were made, and the property now sought to be condemned was staked out during the months of October and November.

On January 11, 1901, the plans of the engineer and a map embracing the territory in question were adopted by the plaintiff, and were duly filed on that day in the various clerk's offices.

On the sixteenth of January, a special election was had and the plaintiff voted to bond itself for the sum of $50,000, for the purpose of paying for the construction of such water-works.

On the 11th of March, 1901, amended maps and plans were made and filed in the village and county clerk's offices. Both maps included the defendant's property, and it was conceded upon the trial that the plaintiff's engineer staked out the limits of the ground now proposed to be taken before January 14, 1901.

On the 14th of January, 1901, the defendant filed articles of incorporation in the Secretary of State's office and in the clerk's office of Montgomery county. The purpose of the corporation is stated in the certificate to be to supply the village of Fonda and the inhabitants thereof with water; and a permit by a majority of the board of trustees was annexed to the articles of incorporation authorizing the formation of such corporation for said purpose.

On the twenty-third of January, the defendant company obtained, what it claims to be, a contract with the board of trustees

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of the village of Fonda, for the furnishing of water to such village upon certain terms.

Both the village of Fultonville and the village of Fonda are conceded to be under the operation of the General Village Act (L. 1897, ch. 414), and the village of Fonda had a board of water commissioners selected from its board of trustees.

On January fourteenth and February second, fourth and nineteenth, the defendant purchased the lands, of a part of which condemnation is sought. Effort was made to agree with the defendant as to the price to be paid for the lands proposed to be condemned, but agreement could not be had and these proceedings were instituted in March following.

The village of Fultonville is situated on the south side, and the village of Fonda on the north side of the Mohawk river. The former has about 1,000 inhabitants and a very inadequate supply of water; the latter has about 1,200 inhabitants and has a general water system, inadequate at dry times, the inhabitants having, however, refused to extend the system by general taxation. The water supply sought to be obtained by these proceedings is the only supply in the immediate vicinity of either village and is about equally distant from each.

The defendant answered, putting in issue the allegations of the petition, and insists particularly that the plaintiff cannot condemn the lands sought to be taken, because the defendant company has already appropriated them to the public use of supplying the village of Fonda with water.

The plaintiff insists that this contention cannot be maintained, because it began its proceedings to acquire the property long before the purchase of the land by the defendant, and that the incorporation of defendant and its purchase of the property was in bad faith and merely for the purpose of hindering the plaintiff in its acquiring a water system; and further that the defendant has no standing in its claim that it has devoted the property to the public use because it has no valid and binding contract with the village of Fonda or any other municipality to supply it with water.

I think the plaintiff's contention must be upheld.

It cannot be seriously contended that the defendant has a valid contract with the village of Fonda to supply it and its inhabitants with water. Aside from the question whether or not the contract should be made with its existing water board instead of the trus-

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tees, no notice was given of the meeting at which the resolution entering into the contract was passed. The board of trustees consisted of a president and four members. Two of the members visited the president and told him that there would be a meeting that night, stating no definite time and serving no notice; and the other member of the board was in no way informed of the meeting. It was a special meeting and, of course, not duly called. In addition to this, the contract which was attempted to be entered into might call for a sum exceeding two and one-half mills on a dollar of the taxable property of the village, per annum (L. 1897, ch. 414, § 234), and it bound the company in no way to furnish water unless it saw fit so to do.

I think when the Legislature passed article 7 of the Transportation Corporations Law (L. 1890, ch. 566), giving the right to individuals to incorporate as water companies, that it must have been its intention that the company should bind itself to give public service by some valid contract which could be enforced, before it acquired the extraordinary privileges of not only condemning land and taking it from unwilling owners, but of acquiring lands which thereafter became devoted to public use so that no other municipality or corporation could acquire it by condemnation proceedings. Such extraordinary privileges must call for mutual obligation. The whole theory of the law in allowing rights to be held for public use is that it is a public necessity and because the public is to be benefited. Of course a water company could acquire lands by purchase as well as by condemnation; but it cannot say, I think, that lands acquired by it by purchase are exempt from condemnation by a municipal or other corporation until it has devoted that land in some obligatory way to the public use. If it were different, any municipality could be thwarted in its effort to obtain water for its inhabitants, by the formation of a water company, without contract to furnish the municipality; and a company might thus hold the only available supply upon the plea that the lands had been once devoted to the public use, and, therefore, they would neither sell nor allow the municipality to condemn.

The defendant has filed no map, and section 83 of the Transportation Corporations Law provides that, before using any land for the purpose of its incorporation, such corporation shall cause a survey and map to be made and filed in the office of the county

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clerk of the county. Of course, it has the right to enter upon lands which it proposes to condemn or which it purchases for the purpose of making the survey, otherwise it could make no map; but this provision is significant as showing that the Legislature intended a devotion of the property acquired either by purchase or condemnation to the use of the public.

In the present case the defendant's property has been devoted in no way, and it has entered into no contract which compels it so to do.

If the defendant's contention is to be upheld, and it sees fit, it can simply withhold from both villages the only available water supply and refuse to sell and prevent condemnation.

In the case of Pocantico Water Works Co. v. Bird, 130 N. Y. 249, the court says: "It is doubtless true that in order to make the use public a duty must devolve upon the persons or corporation holding the property to furnish the public with the use intended." And again, "The contract (with the municipality) does not of itself make the use public, but it does impose upon the plaintiff a duty to supply the villages with whom the contract was made with water." And again, "It is true that the rights of the plaintiff, acquired below its dam, have not as yet been devoted to a public use, but sufficient time has not elapsed."

In addition to this, I think the evidence clearly shows that the defendant corporation was organized for the purpose of thwarting the plaintiff in acquiring the particular water supply in question.

The village of Fonda is situated less than a mile from the plaintiff. The inhabitants of the village had voted upon the proposition of acquiring these same water rights and had rejected the plan. Months before the organization of the defendant, a vote had been taken by the plaintiff and $50,000 had been appropriated for the establishing of a water system, and the plaintiff's engineers had laid out lands proposed to be within the water system and embraced in those purchased by the defendant at a later period.

The gentlemen who organized the defendant corporation may have been actuated by simply patriotic motives and have believed that their village had made a mistake in not acquiring the same supply of water which the plaintiff was in process of obtaining, and may have organized the defendant company for the purpose of preserving to themselves and their neighbors water which they knew they must eventually need. But the plaintiff was first in

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the field. It was going regularly about the business of establishing its water system and the taking of the lands which the defendant subsequently purchased.

If equities are to govern, then the equity is with the plaintiff, for the defendant corporation purchased the property knowing what was contemplated in regard to it on behalf of the plaintiff, and it can hardly be said under the circumstances that the water works company acted in good faith.

I think it might be said under the authority of the Village of Champlain v. McCrea, 165 N. Y. 264, that the beginning of the acquiring of the water privileges by the plaintiff was when it took its vote to expend the sum of $50,000, and employed engineers who staked out the land proposed to be taken and filed their maps, and that any subsequent proceeding to condemn was but a continuation of the proceedings thus begun. But in the view which I take, I do not deem it necessary to go to that extent.

I have examined with care the numerous cases cited by counsel upon both sides, and as I interpret them none of them are contrary to the conclusions which I have reached, nor are they of such character as require them to be distinguished.

The judgment prayed for by the petition is granted, and a decision may be prepared in accordance with the above.

Judgment accordingly.

HENRY T. FOX, Plaintiff, *v.* JAMES H. BRONSON AND GEORGE W. BRONSON, Defendants.

(Supreme Court, Montgomery Special Term, July, 1901.)

Creditor's action — Fraudulent transfer between brothers.

In a creditor's action, it appeared that the defendant, George W. Bronson was a brother of the defendant, James H. Bronson, and his employee from 1873 to 1885 at $1,100 per year, and that he had been paid therefor. In 1896, after James H. had become largely indebted to the creditor, James H. gave George W. a note for $8,624, representing, as alleged, the latter's agreed unpaid extra compensation at $400 per year, for eleven years, and interest, then first given, and added to the note. James H. had at all times been able to pay the principal of this debt, if he owed it. In 1897, after procuring the

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creditor to give him an extension of time, James H., for the note and debt, conveyed to George W. his homestead worth $10,000, and this, with other transfers, left him without property. He remained in the homestead.

Held, that there was no valid consideration for the transfer of the homestead and that the transfer must be set aside as intended to hinder, delay and defraud the creditor.

CREDITOR'S action to set aside a deed of certain land made by the defendant James H. Bronson to the defendant George W. Bronson, as alleged, without consideration.

Louis H. Reynolds (H. V. Borst, of counsel), for plaintiff.

H. Sherburne, for defendant James H. Bronson.

Nisbet & Hanson, for defendant George W. Bronson.

HOUGHTON, J. On the 15th of February, 1897, the defendant James H. Bronson, owned a number of pieces of property in and about the city of Amsterdam, and considerable personal property. He had been engaged for many years in broom manufacturing. He had two nephews, who were jobbers in Philadelphia, handling brooms, and doing business under the title of Bronson & Co. The defendant was interested in them and in their success, and they had become indebted to the plaintiff in an amount in excess of $25,000.

In November, 1895, the defendant James H. Bronson indorsed for Bronson & Company, as surety for paper held by the plaintiff against them, to the extent of $25,000. In December, 1897, the plaintiff obtained judgment against the defendant on $5,000 of this indebtedness, and subsequently, in the year 1898, obtained judgments for $15,000 more of said notes, with accumulated interest.

Bronson & Co., under the advice and with the aid and help of the defendant, James H. Bronson, continued in their business, but apparently with indifferent success. After the indorsement of the notes by the defendant James H., for the benefit of Bronson & Co., he continued from time to time to send them money to aid them in their business, and in that way sent them several thousand dollars.

The defendant James H. was executor of the estate of one Clark,

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and held trust funds belonging to others. On the 15th day of February, 1897, he gave to Sarah A. Clark a deed of a store in the city of Amsterdam to pay an indebtedness for trust funds, held by him belonging to her, of $4,300.

On the 27th of March, 1897, he conveyed the homestead property, the deed of which this action is brought to set aside, to his brother George W. Bronson. This property was worth, at that time, $10,000.

On the twenty-sixth of April, the third of May, and the twenty-fourth of May, the defendant James H. Bronson executed various mortgages and deeds to various parties for the purpose of paying indebtedness for trust funds held by him, or business indebtedness to various parties, and during that period disposed of $3,200 of bank stock, and gave his wife a bill of sale of the household furniture.

These various transfers and alienations divested him of all of his property. No complaint is made by this plaintiff, in his action, against any of the transfers except the deed to the brother, George W. Bronson, of the homestead property. That deed was dated the 27th of March, 1897, signed by James H. Bronson alone, his wife not joining, and was acknowledged on the sixth day of April thereafter, and not recorded until the twenty-fourth day of May thereafter, when all of the other conveyances and mortgages were recorded.

The plaintiff claims that the transfer of the homestead property to the brother, the defendant, George W. Bronson, was without consideration and in fraud of himself, and for the purpose of hindering and delaying him in the collection of his claim, which claim had existed for more than a year prior to the transfers.

The defendants seek to justify the conveyance on the ground that the brother, the defendant George W. Bronson, held a claim for nearly $10,000, growing out of a note given to him by the defendant James H. Bronson in August, 1896, and allege that the consideration for the note was back salary due from James H. to George W.

In 1873, George W. was working for his brother, James H., as superintendent of a broom manufactory, under the stipulated salary of $1,100 per year. The defendants claim that George was dissatisfied with this amount, and suggested to his brother that he ought to receive an additional amount, and that they finally

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agreed upon $400 additional salary. From 1873 until 1885, George continued in the service of his brother, and drew only $1,100 per year. There was no written agreement, nor entry upon the books, nor memorandum of any kind made regarding this alleged agreement. They do not claim that during this eleven years service, any attempt was made by George to obtain payment of the additional $400 per year, except that from time to time James H. assured him that he would take care of him. Eleven more years elapsed, and in August, 1896, the defendant, George W., says that he concluded he better get the matter in different shape from that in which it was. George W., during this time was in need of money. There was an unpaid judgment hanging over him, and he gives that as an excuse why he did not disclose the indebtedness and draw the money. In 1893, this judgment, however, was compromised by the payment of a part, and still no effort was made to collect the money from his brother, or demand made for it. In August, 1896, when the amount was engrafted into a note, the $4,400 and interest had amounted to $8,624. George W. knew that his brother James H. had become involved with the Philadelphia firm, and had indorsed for them for a considerable amount. Something was said in August, 1896, when the note was given, that James H. could secure George W., by giving him a deed of his homestead, although at that time he owned a considerable number of other pieces of real estate, and some personal property.

On the 8th of February, 1897, one of the notes, upon which the plaintiff subsequently obtained judgment, was shortly to fall due, and James H. induced the plaintiff to renew the note for another seven months. On the fifteenth of February thereafter, the alienation of property began, continuing until the twenty-fourth of May following.

In 1885, George moved from the city of Amsterdam to Syracuse and has remained under another employer ever since. No question of interest upon the alleged claim came up until the time of the giving of the note. During all of the time of the existence of the claim, James H. Bronson was abundantly able to pay his brother, who was apparently in need of the money if it was due him. He says he did not press it because he thought it was entirely safe, and that he was secured in his brother's will for the debt.

After the conveyance to George W., James H. continued to

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occupy the premises, and for the first year claims to have paid the rent by paying taxes and making repairs, and after that to have paid a stipulated rent. There appears to have been no change in occupancy and management of the property after its conveyance to George W. The homestead was evidently the piece of property which the defendant, James H. most cared about either saving for himself or continuing in control of.

I think the conclusion is irresistible that the conveyance was made in fraud of the plaintiff, and for the purpose of hindering and delaying him in the collection of his claim, and that the claim of George W. Bronson was not a *bona fide* one. It is possible there may have been some talk that George W. was to have an increase of salary, and that his brother James, who had no children, was to provide for him in his will and make up to him what he might lose by working for reduced compensation; but any valid contract which obligated the defendant James H. to pay to George W. the $9,000, for which the house was transferred, I do not think existed. If there was a valid claim, then James H. had the right to transfer the property in payment of it, but I find that there was none, and that all the circumstances show that the conveyance was made in fraud of the plaintiff.

If the case was to be decided upon sympathy, it should be for the defendant, because his case is a hard one. But in the law the plaintiff's claim is entitled to as great protection as though the indebtedness had been incurred in any other manner than as security for others.

The findings and decree may be in accordance with the above, with costs to the plaintiff.

Judgment accordingly.

WILLIAM A. BRADY, Plaintiff, *v.* GEORGE EDWARDS AND ALBERT SOUTHERLAND, Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Equity — Decision — Opinion — Rescission — Statement of an opinion not fraud.

There is no statute or practice which requires insertion, in a decision in equity in favor of the plaintiff, of the reasons why defenses

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set up in the answer are not sustained, nor need the justice write an opinion in the case.

A party cannot rescind a contract unless he restores what he received under it.

A party's statement of his legal rights in a play, if incorrect, cannot constitute actionable fraud.

ACTION for an accounting of the profits of a play.

Dittenhoefer, Gerber & James (David Gerber, of counsel), for plaintiff.

Mitchell L. Erlanger, for defendants.

ANDREWS, G. P., J. Upon the settlement of the decision to be signed, and of the judgment to be entered in this case, the defendants' attorney has filed a memorandum in which he complains that the grounds upon which the case was decided against his client were not stated in the memorandum opinion filed by me; that he therefore does not know what such grounds were, and that for these reasons he cannot properly protect the interests of his client upon such settlement; and that the decision submitted by plaintiff's attorneys merely recites the facts set forth in the complaint and not the grounds upon which the decision was rendered by me. In his complaint the plaintiff alleged that he was the owner of a certain play, and that he formed a partnership with the defendant to produce it on certain terms; that he delivered the play to the defendant, who had produced the same pursuant to such contract, receiving large profits; that the plaintiff had demanded an accounting from the defendant, which had been refused. All these allegations of the complaint were either admitted by the answer or proved on the trial, and the plaintiff, as a matter of course, was thereupon entitled to a decision that the defendant account to him, unless some of the defenses set up in the answer were established. It was decided by me that none of such defenses was established, and that the plaintiff was entitled to judgment as prayed for in the complaint; and the plaintiff's attorney has submitted a decision in which the grounds upon which the case was decided in his favor are very fully stated. It sets forth that certain facts are found by me, and, as those are the facts set up in the complaint I know of no way in which they could be properly and correctly stated, ex-

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cept by using the language of the complaint itself. In this respect the usual practice in the drawing of decisions is followed. There is no statute, nor any practice, which, so far as I am aware, requires or authorizes the insertion, in a decision in favor of a successful plaintiff, of the reasons why, or grounds upon which, defenses set up in the answer are not sustained. The law and practice in this respect are so clear and well settled that I am led to conjecture that the real supposed grievance of the defendants' attorney is that an opinion was not handed down setting forth such reasons and answering the arguments presented by the defendants' attorney to sustain such defenses. There is no law which requires the judge who decides an equity action to write an opinion in any case. Where the decision sustains any of the defenses pleaded and the complaint is dismissed, the grounds of the decision are, of course, to be inserted in the written decision itself, and it is usual in such cases to write an opinion, long or short, as the case may require, apprising the plaintiff of the reasons why he is turned out of court. Where defenses are not sustained and the action is decided in favor of the plaintiff, sometimes opinions are written and sometimes they are not, and, in some of such cases they are not written because it is supposed that the defendants would prefer that they should not be; and when I filed the brief memorandum decision in this case I considered that this was one of that class of cases. However, it is not difficult to state such reasons, and, as defendants' attorney seems to feel aggrieved that this was not done, I briefly do so now as well as I can from my recollection of the case. The defendants set up the following defense: *First.* "That plaintiff refused to pay his proportion of the expenses to produce the play and refused to live up to his agreement, and that the contract was, for such a refusal, rescinded." This was the only reason given by the defendant at the time of his attempted rescission of the contract, which he admits he made with the plaintiff. The other defenses set up are obviously afterthoughts of the defendant or his attorney. This defense was overruled because, in my opinion, it was not sustained by the evidence. The letters and telegrams, which passed between plaintiff and defendant, and other evidence, show that the defendant did not attempt to rescind the contract because the plaintiff would not contribute his share of the necessary expenses of producing the play, but because the plaintiff would not comply with

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defendant's demand that the plaintiff should deposit moneys enough, not only to cover his share of the expense of producing the play, but also a sufficient amount to cover his share of possible losses that might occur if the play was not successful. This was a demand which the defendant had no right to make under the terms of the contract between himself and the plaintiff, and I am compelled to say that, in my opinion, such letters and telegrams show a determination on the part of the defendant to make, and persist in making, a demand, which he well knew he had no right to make, in order that he might find a pretext for rescinding the contract. Moreover, it is elementary law that, in a case like this, the defendant could not rescind the contract without returning what he had received from the plaintiff. He had received the play, and he retained and used it, which he had no right to do, even if he had just grounds for rescinding the contract. His action in regard to the demand which he made, and his attempted rescission of the contract, seem to me to have been unfair and unlawful. *Second.* The defendant also set up the following defense: "That plaintiff falsely represented that he possessed exclusive rights to the play in England, whereas it was public property, and consequently the contract was void because of the fraud in its inception." This seems to have been a somewhat late discovery of the defendant, or his attorney, for no such reason was given to the plaintiff when the defendant informed the plaintiff that he had rescinded the contract; and, in my opinion, there is no evidence tending to sustain this defense. The plaintiff had bought the play, and the transfer to him purported to give him the exclusive right to produce it in England, though the defendant has made a laborious effort to prove that, under the laws of England, the plaintiff did not acquire, or have, such right. Assuming — but not deciding — that this effort has been successful, there is no evidence tending to show that the plaintiff knew, or had any reason to suppose, that he did not possess such right. When fraud is charged, as in this case, it is essential — with some exceptions of which this is not one — to prove an intent to defraud. The plaintiff merely stated what he believed, and had good reason to believe — that he had such right — and such statement, at the most, if the plaintiff had any thought about the matter, was merely an expression of his opinion upon what now seems to be quite a difficult question of law. If at the time the defendant undertook

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to rescind the contract he knew or believed that the plaintiff did not have the right in question, why did he not so inform the plaintiff, instead of giving another reason for such rescission, retaining the play in his possession and using it, as he did, upon the pretense that the plaintiff would not contribute his share of the expenses of producing it? Moreover, if he was justified in attempting to rescind the contract upon this ground, it was clearly his duty, instead of retaining and appropriating the play to his own use, to return the copy of the play which had been delivered to him to the plaintiff; but it appears that instead of so doing he went on, and after making some changes in the play, and changing its title, produced it in London and elsewhere, and by his own admission received between £9,000 and £10,000 gross receipts upon such production; and even if it be true that the plaintiff did not have the exclusive right to produce the play in England, it does not appear that the defendant was in any way injured because of that fact. *Third.* Another defense set up in the answer was the following: "That the contract was void for want and failure of consideration, and was rescinded for that reason." No such reason was given by the plaintiff at the time he attempted to rescind the contract. If by want of consideration is meant that the consideration for the contract failed because, as is claimed, the plaintiff did not have the exclusive right to produce the play in England, the reason for overruling this defense has been already partly stated; and in addition it is clear that if there was a failure of consideration for that reason the defendant was bound to return the play to the plaintiff, and he could not rescind without so doing. If it is meant that the plaintiff had no title to the play because Du Suchet, the author of the play, had assigned the play and all rights under it to his wife before he assigned the same to Smyth & Rice, the reply to such a proposition is that the testimony of Du Suchet in this respect is not entitled to any credit. He was called as a witness for the defendant on the trial, and did testify that he had made such assignment to his wife. He, however, admitted that he had made the assignment afterwards to Smyth & Rice, and that he had received from them payments according to the terms of such assignment. He was asked if the assignment to his wife was in writing, and he said it was; and also was asked if he could produce it, and he said he could. The next day of the trial he appeared and stated that this assignment could not be found. If it

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was true that he had made such prior assignment to his wife he convicted himself of a gross fraud upon Smyth & Rice, and his testimony was thereby wholly discredited. Besides, he admitted that he had received payments under the contract from Smyth & Rice and had turned over the money so received to his wife. Under the circumstances it must, therefore, be held that, even if the assignment to his wife was made, the subsequent assignment to Rice was ratified by her, as she certainly must have known that the moneys which she so received were payments under a subsequent assignment to Smyth & Rice or someone else. *Fourth.* Another defense set up is as follows: "That 'My Friend from India' was never produced, but a new play, 'My Friend the Prince.'" Testimony was introduced showing that, with the consent of the plaintiff, before the attempted rescission of the contract, Mr. McCarthy was employed to change the play in some respects so as to adapt it to English audiences. This change was made, and the title was also changed from "My Friend in India" to "My Friend the Prince," and it was produced by the defendant under the latter title; but the changes made in the play, and the change in the title, were not changes of such a substantial character as to deprive the plaintiff of his rights under the contract with the defendant. The foregoing is a brief statement, based upon my recollection of the evidence given upon the trial, of the reasons why the defenses set up in the answer were not sustained. It would be easy to elaborate such statement, but I see no occasion for so doing. When the case was decided I assumed that defendant's attorney had seen and was familiar with the brief submitted by the plaintiff's attorney, and I, therefore, thought it was sufficient to refer him to that brief for a full and complete statement of the argument which, in my judgment, refuted those presented by him in support of such defenses. In his memorandum, now presented, the defendant's attorney states that he has never seen that brief. I, therefore, suggest, and request, that the plaintiff's attorney furnish the defendant's attorney with a copy of such brief, and I will postpone the settlement of the decision and judgment until the defendant's attorney has had a reasonable opportunity to prepare and submit further proposed amendments of the same, if he wishes to do so.

Ordered accordingly.

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THE OMEGA OIL CO., Plaintiff, *v.* J. CHARLES WESCHLER et al., Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Trademark — Soap manufacturers enjoined from using the words "Omega Oil," belonging to liniment manufacturers — Use of a distinctive color.

The owners of a trademark in the name "Omega Oil", a liniment, green in color and for which green has been adopted as a distinctive color, are, upon the ground of unfair competition, entitled to restrain manufacturers of a green medicated skin and scalp soap, employing therein small quantities of "Omega Oil" and putting the soap up in a green box and wrapper, from using the words "Omega Oil" as a part of the designation of their soap, as liniment and soap, upon the proof submitted to the court in this action for an injunction, are not of such a different character as to permit the soap manufacturers to use the name created and made valuable by the liniment manufacturers.

The court further held that, if the soap manufacturers omitted from the designation of their soap the words "Omega Oil", it had no power to restrain them from using the color, green, in their soap and on its boxes and wrappers.

MOTION to continue a temporary injunction.

Guggenheimer, Untermyer & Marshall (Louis Marshall, of counsel), for plaintiff.

Weschler & Burstein (J. Charles Weschler, of counsel), for defendants.

BLANCHARD, J. This is a motion to continue, during the pendency of this action, a temporary injunction heretofore granted herein, restraining the defendants from using the words "Omega Oil" or the word "Omega" as a designation of any soap; or from advertising or representing its soap as composed of "Omega Oil" as one of its constituents; or from using such words in con-

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nection with any wrapper or box in which soap is packed, or from selling or exposing for sale any soap packed in a green box or package. It appears from the papers that the plaintiff is the manufacturer of a liniment known as "Omega Oil," which name was created by the plaintiff, and nearly $300,000 has been expended in advertising the name and the qualities it is supposed to possess. The plaintiff has adopted green as the distinctive color of its advertisements and labels, and the liniment itself is green. It is claimed by the plaintiff that this "Omega Oil" possesses certain curative qualities, and it has been advertised as a remedy for skin and scalp diseases, for sore and perspiring feet and other ailments. "Omega Oil" has thus become well and favorably known to the public and a large demand therefor created. The defendants have put upon the market a soap which they term "Omega Oil Medicated Soap," and claim it to be useful for skin and scalp troubles. The soap is green in color, as are likewise the paper wrapper in which each cake is inclosed and the box in which the cakes are packed. That the plaintiff has a valid trade-mark in the name "Omega Oil" is beyond dispute, and it does not seem to be questioned by defendants, but it is claimed the exclusive use of this name is limited to an article of the same class as that to which it has been applied by plaintiff, *i. e.*, a liniment, and that a soap is of a different class, and that, therefore, plaintiff's trade-mark does not extend to the use of the words as adopted by defendants and applied to a soap. It was conceded upon the argument hereof by defendants' counsel that defendants had adopted the words "Omega Oil" because they had become well known to the public. The equities of the case are clearly with the plaintiff. I am satisfied from the proof here submitted that the articles, *i. e.*, liniment and soap, are not of such a different character as will permit the defendants the use of the name created and made valuable by plaintiff. The liniment may have a much broader application than the soap, but it also possesses to a certain extent the qualities of the soap and is used for many of the same purposes. In the case of Carroll v. Ertheiler, 1 Fed. Rep. 688, the complainants, having the right to the use of the words "Lone Jack" as applied to smoking tobacco, succeeded in restraining the defendant's appropriation of those words to cigarettes, even though an accompanying device employed by the complainants was omitted by defendant. In the case of

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Church & Dwight v. Russ, 99 Fed. Rep. 276, it was held that the complainant, the owner of a certain brand of baking soda, had the right to restrain defendant, who manufactured baking powder composed of twenty-five per cent. of plaintiff's baking soda, from using its trade-mark. It was held that baking soda and baking powder, coming in direct competition with each other in sale and use for the same purpose, belong to the same class of goods. Judge Baker in his opinion said: "The public would readily suppose that the baking powder bearing the complainant's trade-mark was either manufactured by it or by someone having its authority and consent, and that it vouched for the superiority and high character of the goods bearing such trade-mark. Goods are in the same class whenever the use of a given trade-mark or symbol or both would enable an unscrupulous dealer readily to palm off on the unsuspecting purchaser the goods of the infringer as the goods made by the owner of the trade-mark or with his authority and consent." The reasoning of this decision obviously applies in the case before me. Under this decision there is no force in defendants' contention that because of the alleged use in small quantities of plaintiff's liniment in the manufacture of their soap defendants had the right to appropriate plaintiff's trade-mark. The adoption of the words "Omega Oil" by defendants was calculated to deceive the public into the belief that plaintiff's article was being put up for sale in another form, or at least into the belief that soap was placed on the market by plaintiff or by its consent. The adoption of green as the color of the soap and the green wrapper and box by defendants tended to further such deception, green being the distinctive color of plaintiff's liniment and of the labels on its bottle. Defendants' object in choosing the name and color of its soap is manifest, and, so far as I can see, for but a single purpose, and, as stated by Judge Lacombe in the case of N. K. Fairbank Co. v. R. W. Bell. Mfg. Co., 77 Fed. Rep. 869, "that purpose a species of competition in trade which courts of equity hold to be unfair." If the words constituting plaintiff's trade-mark be omitted from the soap the mere use of the color green in the soap or on the wrapper or box cannot be enjoined. Fischer v. Blank, 138 N. Y. 244, 249. To this extent the temporary injunction heretofore issued must be modified. Defendants' contention that plaintiff should be denied relief by this court because it is not here "with clean hands," by reason

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of its alleged misrepresentation to the public that one of the component parts of Omega Oil is a green herb grown in Switzerland, cannot be sustained. The proof on the part of the plaintiff is that such an herb is used in the manufacture of the Omega Oil. In the face of this positive affirmative averment of the presence of the herb, I would not be justified in concluding its absence merely from the chemical analysis of plaintiff's expert. An order may be presented continuing the injunction *pendente lite*, except with the modification indicated. Plaintiff may have $10 costs of the motion to abide the event.

Injunction modified and continued, with $10 costs to abide event.

WILLIAM E. HOWLEY, Plaintiff, *v.* ALBERT KRAEMER, Defendant.

(Supreme Court, New York Special Term, July, 1901.)

Municipal Court of the city of New York — Approval of undertaking on stay — Code C. P., §§ 1335–3050.

An undertaking to procure a stay on appeal of an execution on a judgment of the Municipal Court of the city of New York is expressly required, by the first clause of Code C. P., § 3050, to be approved by the justice rendering judgment or by a judge of the appellate court, and this requirement is not affected by the last clause of said section making section 1335 of said Code applicable to such an undertaking, which latter section, among other things, provides that "It is not necessary that the undertaking should be approved".

APPLICATION to set aside an execution issued out of the Municipal Court of the city of New York, and to vacate a levy made thereunder by a city marshal.

Ferguson & Sinnott, for plaintiff.

Jones Cochrane, for defendant.

BLANCHARD, J. This is an application to set aside an execution issued out of the Municipal Court of the city of New York, and to vacate a levy made thereunder by a city marshal.

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It is claimed that such execution was irregularly and improperly issued, because at the time of its issuance a stay had been perfected upon the appeal to this court in accordance with the statutory enactments pertaining to this subject. The only question here presented is whether or not the undertaking filed and copy served was a sufficient compliance with the statute. When the undertaking was filed it had not been approved by the justice who rendered the judgment, or by a judge of the Appellate Court, as is required by section 3050 of the Code of Civil Procedure, and in fact it was not approved by any one. Neither did the copy served contain any such approval. It is contended, because section 1335 of the Code of Civil Procedure is made applicable by section 3050 to such an undertaking, and because by section 1335 it is provided, that "It is not necessary that the undertaking should be approved," that, therefore, the approval of the undertaking was unnecessary in this case. The statement in section 3050 that "Section 1335 of this act applies to such an undertaking" must be held to mean that it applies so far as it is not inconsistent with what is specifically provided by section 3050. Since it is specifically provided by section 3050 that the undertaking must be approved, I must conclude that the stay was not perfected and that the execution was properly issued.

It appears, however, that within a few days thereafter the approval of the justice who rendered the judgment appealed from was obtained, but it does not appear from the papers here submitted that further proceedings were stayed by a compliance with section 3051 of the Code of Civil Procedure, by the service of a copy of the approved undertaking. When that section is complied with the execution may be vacated upon payment to the marshal of his legal fees.

The motion is denied, without costs, but an order will be made in accordance with the views herein expressed.

Motion denied, without costs.

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ELLEN COUGHLIN, as Administratrix, etc., of MICHAEL COUGHLIN, Deceased, Plaintiff, v. THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Special Term, July, 1901.)

Interest — Statute (L. 1900, ch. 678), showing an intention to give it.

A statute (L. 1900, ch. 678) for the payment of a contractor with Long Island City for work done for it in 1888 and 1889 empowered the board of estimate and apportionment of New York city to act in the matter, declared that if it appeared to the board that the services were actually contracted for and performed and that the fair and reasonable value of the work "was" the sum of $3,862.50, as claimed, or any less sum, the board should certify what the work "was" reasonably worth and the city comptroller was authorized to pay the claimant that sum, "together with interest on the aggregate sum so certified". In April, 1901, the board certified that the fair and reasonable value "is $3,862.50". The work was completed on or before December 22, 1889.

Held, that it was the evident intention of the Legislature that the claimant should have interest from the completion of the work, December 22, 1889, and not, as claimed by the city, from April, 1901, when the board made its certificate.

DEMURRER by plaintiff to answer of defendant.

Geo. W. Stephens, for plaintiff.

John Whalen, Corporation Counsel (Chas. Blandy, assistant), for defendant.

MCADAM, J. Between June 22, 1888, and December 22, 1889, the plaintiff's intestate, under a contract between him and Long Island City, cleaned the streets and sewers of and removed the ashes and garbage from the first ward of Long Island City. The amount due the contractor for the said services, $3,862.50, was audited and allowed by the common council of that municipality, but no payment was made for said services. In 1900 the Legis-

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lature passed an act (L. 1900, ch. 678) providing for the payment of the said claim. The statute authorized the board of estimate and apportionment of the city of New York, in its discretion, to inquire into the facts relative to the justness of the contractor's claim as a matter of fact against the city of New York for the performance of the aforesaid services, and if it should appear to said board that the services were actually performed and were actually ordered, directed or contracted for by the common council of Long Island City, acting in its official capacity, and "that the fair and reasonable value of the work was" the sum of $3,862.50, directed the said board to so certify the said sum in writing, which sum or any lesser sum which the said board might determine and certify in writing that the work "was reasonably worth" the comptroller was authorized and directed to pay to plaintiff, "together with interest on the aggregate sum so certified." The statute further provided that the amount paid should be charged to and made out of any unexpended balance of any appropriation made to any of the departments or funds of Long Island City for 1888 and 1889; and if there should be no such unexpended balance an action might be brought against the defendant for the amount certified by the board of estimate and apportionment, and that in said action judgment for the amount awarded by said board, with interest, should be entered, without costs. In April, 1901, the board of estimate and apportionment, pursuant to the provisions of the statute referred to, certified that the fair and reasonable value of the services performed by the contractor "is $3,862.50." The foregoing facts are properly pleaded in the complaint, which demands judgment for $3,862.50, "with interest thereon from the average date, March 22, 1889," and costs. The defendant, by its answer, admits all the facts, and as a defense alleges that it is not liable for interest except from April 15, 1901, on which date the certificate of the board of estimate was filed in the office of the comptroller, and that under the terms of the statute it is not liable for costs. And the defendant offers to allow the plaintiff to take judgment for the amount certified by the board of estimate and apportionment, $3,862.50, with interest from April 15, 1901, without costs. The plaintiff demurs to the answer on the ground that it is insufficient in law upon the face thereof. The question, therefore, is from what date the plaintiff is entitled to interest on the sum

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certified by the board of estimate and apportionment, and the answer depends upon the intent of the Legislature as manifested in the statute referred to. From a careful reading of the statute it would seem that the Legislature intended that in the event of the board of estimate and apportionment certifying for the payment of any sum for services performed by the contractor, such sum should represent what the fair and reasonable value of said services was at the time they were performed, and that the comptroller should pay the same, "together with interest on the aggregate sum so certified." The statute uses the word "was" in connection with the value of the services; and the fact that the board certifies that such value "is" $3,862.50 is scarcely sufficient to show that the board disregarded the legislative mandate and certified a sum which was the reasonable value of the contractor's services when the said board acted in the matter instead of the value of such services at the time they were performed. It must be assumed that the board complied with the directions of the statute and certified what the services were worth at the time of their performance. It cannot be that the board allowed interest on the demand, for by the legislative enactment it had nothing whatever to do with the subject of interest. The board was merely to determine the reasonable value of the work, and the comptroller was directed to pay the amount certified by the board "together with interest on the aggregate sum so certified." Interest from when? Surely not from the time the certificate was filed with the comptroller, as claimed by the defendant, for several reasons. The act recognizes the fact that the work was all performed prior to December 22, 1889, and the comptroller was to pay the reasonable value thereof, when certified, together with interest. If the comptroller had paid at once, as he was directed to do, there would be no period of time for which interest could be computed. If the comptroller delayed the payment, the law, without any special statute, would have allowed interest from and after the time the certificate was filed, by way of damages for the detention of the money. Brady v. Mayor, 14 App. Div. 152; Donnelly v. City of Brooklyn, 121 N. Y. 19, 20; DeLavallette v. Wendt, 75 id. 579; Wilson v. City of Troy, 135 id. 96, 104; 16 Am. & Eng. Ency. of Law (2d ed.), 1097. It is plain, therefore, that to sustain the defendant's contention would render the mandate of the Legislature as to interest meaningless, and it is a familiar rule of con-

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struction that that interpretation which gives significance to all the words of a statute or an instrument shall be preferred to one which leaves the words which were used inoperative. City of Rochester v. Coe, 25 App. Div. 307; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 394; Potter's Dwar. Stat. 188, note. The plaintiff's intestate had performed valuable work for the municipality and the Legislature intended that his legal representatives should be paid therefor, not only the reasonable value thereof, but the interest thereon in addition thereto. This is apparent throughout the enactment, and effect must be given to the legislative command. Sedg. Stat. Lim. (2d. ed.); Pom. Notes, 194. It follows that the demurrer to the defendant's answer must be sustained, but instead of calculating interest from an average date (as the plaintiff has assumed to do), it must be computed from December 22, 1889, when the contractor's services, as certified by the board of estimate and apportionment, amounted to $3,862.50.

Demurrer sustained.

THE IRVING SAVINGS INSTITUTION, Plaintiff, *v.* JULIUS A. ROBINSON et al., Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Judicial sale — "Highest bidder" — Resale — Code C. P., § 1678.

Real property must be sold at a judicial sale to the highest bidder and this means the highest bidder at the sale who is then and there willing and financially able to carry out the terms of sale.

An auctioneer has a right to ignore or reject the bid of an irresponsible person.

Where parties to an action in which there has been a judicial sale attack the sale for irregularities, and because their bids were ignored, they must show that they themselves were technically right.

To procure a resale they should show that they were able at the sale to make the cash payment on their bid, that they are pecuniarily responsible, that the property sold was worth more than the bid accepted, and there should be a *bona fide* offer of an increased price with satisfactory security.

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MOTION by the heirs and devisees of owner of the fee, subject to a mortgage, to set aside judicial sale under foreclosure of said mortgage.

Uriah W. Tompkins, for motion.

F. W. Judge, for plaintiff, opposed.

Frederick M. Littlefield, for purchaser at sale.

MCADAM, J. Property at an auction sale must be sold to the highest bidder (Code C. P., § 1678), which means the highest responsible bidder, one ready as well as able to carry out the terms of sale and to pay down the ten per cent. deposit required. "The whole theory of an auction sale proceeds upon the ground that the highest responsible, *bona fide* bidder is entitled to the goods. Otherwise an auction is a farce. * * * Doubtless the auctioneer must have the right, for his own protection, to reject the bids of an irresponsible party." Benj. Sales (6th Am. ed.) by Bennett, 454; 1 Am. & Eng. Ency. of Law (1st ed.), 989; Den v. Zellers, 7 N. J. Law, 153; Gray v. Veirs, 33 Md. 18; Holder v. Jackson, 11 Up. Can. P. 543; Green v. Meyer, 44 N. Y. Supp. 81; Leslie v. Saratoga B. Co., 31 Misc. Rep. 129; Kinney v. Showdy, 1 Hill, 544. Even a municipality may reject a higher bid of men of doubtful and unknown financial credit made for a franchise and accept a lower one of a competing corporation of known financial strength. Barhite v. Home Tel. Co., 50 App. Div. 25; Matter of Marsh, 93 N. Y. 431. The term highest bidder necessarily carries with it the idea of financial ability of an amount sufficient to successfully carry out the undertaking in which the party has offered to engage. At the present auction sale the property was started at $167,000, and was then raised by a bid of James R. Smith to $168,000. Thereafter a lady in black made a statement as follows: "One hundred and eighty-two hundred." From other things the lady in black said, her evident purpose was to break up rather than assist the sale. The moving papers also allege that a Mr. Dunn made a bid of $169,000, which was not recognized. No one seems to know anything about the mysterious Dunn, his domicile, business or responsibility, and Dunn himself has not come forward to tell who he is, or what he amounts to

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financially. No one conducting the sale heard of Dunn or his bid. Emeline S. and Mary C. Robinson, heirs and devisees of the owner of the fee, swear that they bid $200,000 for the property, and that their bid was ignored. While they were evidently acting under excitement and almost unconscious of what they were saying at the sale, the court would, nevertheless, if there was any evidence of their ability to carry out the purchase, receive the mere suggestion from a responsible source of an offer of $200,000 as entitled to great weight. Considering Smith's bid of $168,000, was not the sum of $200,000 rather an erratic bid to follow? Does the mere circumstance not cast doubt upon its *bona fides?* In addition to these facts, the Robinsons do not show that they had $20,000 with them at the sale to pay the required 10 per cent., and from their silence on this all-important subject it is safe to assume that they did not carry that amount of money with them to the exchange salesroom. Everyone knows that an auctioneer at a sale requires ready money, and that a person without it may as well stay away. Unless they had this amount of money ($20,000) with them they were not entitled to be recognized as bidders, and even if they bid upon the property the auctioneer had the right to ignore it. Furthermore, not one word is said about the pecuniary responsibility of these two ladies, no offer has been made to bid more than $168,000, the sum the property brought at the sale, and not a particle of evidence has been furnished that the property is worth more than the purchaser, Mr. Smith, agreed to pay for it. Singularly, all these things so pertinent to a motion for a resale have been omitted from the moving papers. See People v. Bond St. S. Bank, 53 How. Pr. 336; Brush v. Shuster, 3 Abb. N. C. 73; Baker v. Baker, 22 Wkly. Dig. 137. Several cases hold that to authorize a resale the rule is that there must be a *bona fide* offer of an increased price, with satisfactory security. Lansing v. McPherson, 3 Johns. Ch. 424; Duncan v. Todd, 2 Paige, 102; Am. Ins. Co. v. Oakley, 9 id. 263, 264; Baker v. Baker, *supra.* All these rules have been disregarded by the moving parties, who take the sole ground that they were technically right and the sale, in consequence, irregular, one that ought to be set aside as of course. Where parties move against irregularities, they should at least show that they are technically right themselves. To prove that they were improperly ignored by the auctioneer the moving par-

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ties were bound to establish their right to recognition by the presence of $20,000 at the sale. They ought to have made known their pecuniary responsibility in some reliable manner and shown that some injury had come to them by the acts of which they complain. Setting aside a judicial sale is not altogether matter of course, and if parties intend to invoke a discretion they should set forth facts making it appear to the judicial conscience that the same ought to be exercised in favor of the moving parties. Nothing of the kind has been done here. To set aside the present sale would be to encourage illusory and "fake" biddings and tend to bring auction sales into disrepute. The property was regularly sold, at a fair price, to the highest *bona fide* bidder, whose purchase should not be disturbed. Motion for resale denied, with $10 costs.

Motion denied, with $10 costs.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* GEORGE H. BUSHNELL, Defendant.

(Supreme Court, New York Special Term, July, 1901.)

Crimes — Certificate of reasonable doubt — Admission of improper evidence.

Where a witness for the prosecution is permitted to give evidence on the trial of an indictment of conversations, had by him with the defendant five months after the commission of the crime named in the indictment, in which the witness charged the defendant with the commission of similar crimes with other persons as well as with other and different offenses — to which charges, it seems, the defendant made no reply — the admission of such incompetent evidence creates such a reasonable doubt as to the legality of the defendant's conviction as justifies the issue of a certificate of reasonable doubt whether the judgment should stand.

APPLICATION for a certificate of reasonable doubt whether a judgment convicting the defendant should stand.

Amos H. Evans, for motion.

E. A. Philbin, District Attorney, opposed.

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McAdam, J. Assuming that the evidence adduced on the trial of the indictment justified the submission to the jury of the question whether the testimony of the alleged accomplice was sufficiently corroborated, the further question, whether irrelevant and immaterial testimony prejudicial to the defendant was not admitted, over due objection and exception, remains to be considered. The testimony claimed by the moving party to have been improperly admitted consisted of a conversation had by the witness Comstock with the defendant at the witness' office, where the defendant called at Mr. Comstock's request. The said witness was allowed to state all the conversation he had with the defendant at that place. The witness, in the conversation detailed by him on the stand, not only testified to admissions made by the defendant with respect to the crime charged in the indictment, but also testified that he accused the defendant of committing the crime charged in the indictment at other times and with other persons than those mentioned therein; that the defendant's wife had called at the witness' office and made statements concerning criminal acts other than the one charged in the indictment, which statements the witness had investigated and was satisfied they were true; and the witness further testified that in the said conversation he told the defendant that the defendant had been arrested and convicted in the Jefferson Market Police Court; that the defendant was guilty of traducing the defendant's wife in the most scandalous manner; that the defendant had taken $1,500 of her money and the witness could prove it by the defendant's checks and the stubs of his check-books; that the defendant's wife had been true and loyal to him until she discovered his gross conduct; that the defendant had been arrested at one time in Syracuse for the same charge made in the indictment; that the defendant had the reputation of being a person guilty of the species of crime for which he was on trial, and that unless he reformed, the witness would take criminal proceedings against him. All this conversation, which occurred nearly five months after the commission of the offense charged in the indictment, appears to have been admitted in evidence on the theory that the statements made by the witness in the conversation were relevant as admissions of the defendant. An admission is a statement suggesting any inference as to any fact in issue, or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding.

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Chase's Steph. Dig. (2d ed.) 57. If the defendant had admitted or confessed to the witness Comstock, or to anybody else, that he had committed other crimes similar to the one charged and had a tendency to commit such crimes, could evidence of such admission or confession have been properly received? Plainly not. See People v. Sharp, 107 N. Y. 427; People v. McLaughlin, 150 id. 365, 386. And there is no logical reason why a different rule should be applied to a so-called admission by acquiescence from that applicable where an admission is expressly made. The witness Comstock was not only allowed to testify to the defendant's admission or confession, in the proper sense of that term, but he was permitted to give hearsay and opinion evidence and testimony of acts similar to, but not specifically connected with, the offense charged —(*res inter alios actae*). As the natural effect of such testimony on the jury was prejudicial to defendant (see People v. Kennedy, 164 N. Y. 455), I entertain a reasonable doubt as to whether the defendant was legally convicted of the heinous crime charged, and, therefore, grant the certificate applied for.

Application granted.

THE PEOPLE ex rel. JOHN F. McINTYRE, Relator, *v.* BIRD S. COLER, Comptroller, Respondent.

(Supreme Court, New York Special Term, July, 1901.)

District attorney — Compensation of his counsel in New York city — Certificate of presiding justice — Appeal — L. 1872, ch. 733, § 2; 1874, ch. 323, § 2; 1892, ch. 686, § 1.

The general statutory provisions authorizing a district attorney to employ counsel in an important criminal case were not repealed by the County Law, so far at least as relates to the county of New York, as the County Law does not apply to that county.

The certificate of the justice presiding at the trial as to the amount of the counsel's compensation cannot be attached collaterally — on his subsequent application by mandamus to compel the city comptroller to pay him.

If the district attorney or the comptroller regard his compensation as excessive, the district attorney should appeal from the order fixing it.

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MOTION for peremptory mandamus.

John F. McIntyre, relator, in person.

Eugene A. Philbin, District Attorney, for respondent.

McADAM, J. The relator, an attorney and counselor at law, was duly retained by the district attorney of New York county to take the principal part as prosecutor in the second trial of Dr. Samuel J. Kennedy for murder in the first degree. It was an important prosecution, and the relator, having acted in the same capacity on the first trial, was familiar with the facts, and, therefore, deemed peculiarly qualified for the work. The authorization was made under an act of the Legislature, and whether that statute be section 2, chapter 733 of the Laws of 1872 (vol. 2, p. 1753) or section 2, chapter 323 of the Laws of 1874 (p. 387) is of no consequence. In substance, each of said provisions declares that the district attorney for any county, in which an important criminal case is to be tried, may, with the approval of the county judge, filed in the county clerks's office, employ counsel to assist him in such trial, the cost and expense thereof to be certified by the judge presiding at such trial, to be a charge on the county in which the indictment was found, to be assessed, levied and collected by the board of supervisors of such county at its next annual assessment, levy and collection of county taxes after the performance of such services, and thereupon to be paid over to the party entitled to the same. The services commenced January 2, 1901, and terminated February 25 following, and for such services the relator duly presented a bill for $7,500, which was submitted for certification to Mr. Justice Fursman, who presided at the trial, and he reduced the amount to $5,000, at which sum he certified the bill. On presentation of the certification to the comptroller, he declined to pay the bill, his contention being that the charge was excessive. The relator, therefore, applies for a mandamus to compel payment of the sum certified. It seems to be objected that the act relied on was repealed by the County Law (L. 1892, ch. 686). But section 1 of the last-named statute expressly provides that it shall not apply to the county of New York. So that the former statute applicable to the county of New York in the respect named

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is unaffected by the present County Law. The object of the act relied upon by the moving party was to enable the presiding justice, the person best qualified to determine the value of legal services rendered before him, to tax the same; and, in People ex rel. Allison v. Board of Education, 26 App. Div. 208, where a justice of the Supreme Court had acted under a similar statute, the court held that his conclusions would not be questioned collaterally, and that payment of the bills allowed by him was properly compelled by mandamus. To hold otherwise would determine that this court at Special Term might review the adjudications of a co-ordinate branch of the court having exclusive jurisdiction in the premises. If the district attorney was dissatisfied with the amount fixed by Mr. Justice Fursman, he should have appealed from the order granting such sum; not having done so, he is concluded by the certificate. The relator is, therefore, entitled to the peremptory writ, with costs.

Writ granted, with costs.

THE PEOPLE ex rel. MOSES JAFFE, Relator, *v.* THOMAS FITZPATRICK, Clerk of the Fifth Municipal Court of the City of New York, Respondent.

(Supreme Court, New York Special Term, July, 1901.)

Municipal Court of the city of New York — Has no equitable control over its judgments — Attorney's lien, if existing, not enforcible.

The Municipal Court of the city of New York, an inferior court of limited statutory jurisdiction, has no such equitable control over its judgment as empowers it to enforce an attorney's lien thereon by vacating, to the extent of the lien, a satisfaction executed by the client, and issuing execution for the lien.

Quære, whether such a lien exists in that court?

APPLICATION for peremptory writ of mandamus.

Thomas Gilleran and Roger Foster, for relator.

J. A. Seidman, for defendants in judgment.

S. Feuchtwanger & A. C. Anderson, for respondent.

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McADAM, J. A judgment was recovered in the Municipal Court, fifth district, April 29, 1901, in favor of Louis Shulman against Colman Schechter et al. for $228.15 damages and costs. The relator, the attorney for the plaintiff in that action, received no fee, but was to have for his services 50 per cent. of the recovery, besides the taxable costs. On May 1, 1901, the plaintiff received $50 and executed a satisfaction piece of the judgment, which was filed with the clerk of the court, and the judgment was thereupon canceled of record. L. 1857, ch. 344, § 58; N. Y. Consol. Act, L. 1882, ch. 410, § 1408. Upon proof by affidavit that the defendants knew of the attorney's lien, and on notice to the defendants, the justice of the Municipal Court made an order that said satisfaction piece be vacated and set aside to the extent of $128.65, and the clerk of the court was required to issue an execution for that amount to the plaintiff's attorney. The clerk, doubting the power of the justice to make the order, declines to issue the execution, and the present application is for a writ of mandamus compelling him to issue the same. Assuming (but not deciding) that an attorney in a Municipal Court action has a lien for costs similar to that allowed in courts of record, the question still remains whether the powers exercised by courts of record in regard to the enforcement of such liens have in any manner or to any extent been vested in the Municipal Court. The Municipal Court, as successor of the District Courts, is, like a Justice's Court, an inferior tribunal, not proceeding according to the course of the common law, but of statutory creation, with a limited jurisdiction, taking nothing by implication. Possessing only such powers as are expressly conferred by the Legislature, the court must in every instance show express authority for its acts. Jones v. Reed, 1 Johns. Cas. 20; Ahern v. Nat. S. Co., 11 Abb. N. S.) 356; Loomis v. Bowers, 22 How. Pr. 361; Loeb v. Smith, 24 Misc. Rep. 200; s. c., 52 N. Y. Supp. 677; Reubenstein v. Silberfeld, 24 Misc. Rep. 201; s. c., 52 N. Y. Supp. 703; Stone v. Miller, 62 Barb. 430; Bloom v. Huyck, 71 Hun, 252. No statute can be found which gives to the Municipal Court the power to entertain proceedings to vacate satisfaction pieces filed on which judgments have been regularly canceled on the docket, or to make any orders respecting the same. As was said by the court in Flint v. Van Dusen, 26 Hun, 607: "Courts not of record, possessing only a limited jurisdiction, have no such equitable

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control over their judgments as will enable them to adjudicate upon and enforce liens thereon. No one will contend that a lien exists for services rendered in a Justice's Court." See also Read v. Joselyn, 1 Sheld. 60. In Harris v. Palmer, 5 Barb. 106, the court said: "In the present case the judgment sought to be set off is before a justice of the peace; and upon his docket appears to be, and is, in fact satisfied; and I do not see but he would be a trespasser by issuing an execution upon it on which the defendant's property should be taken. If it was in a court of record, perhaps the court would have the power, upon a proper application and sufficient facts appearing, to vacate the satisfaction and order an execution. But no such power resides in a justice's court, and the only way to test the plaintiff's right to enforce the judgment is to bring a new action upon it, when perhaps it would be competent for him, in answer to the proof of satisfaction by the levy and sale, to show the facts which he contends he has established on this motion." See also Piper v. Elwood, 4 Den. 165. The court, in Drago v. Smith, 92 Hun, 536, held that the provisions of section 66 of the Code of Civil Procedure, giving an attorney a lien upon his client's cause of action, do not apply to the Municipal Court of Buffalo. We find no provision of law making this section applicable to the Municipal Court of the city of New York. After a satisfaction piece has been canceled in whole or in part, the revival, as far as the same affects innocent purchasers, is regarded as a new judgment. Beebe v. Bank of New York, 1 Johns. 529; Taylor v. Ranney, 4 Hill, 619. In Carpenter v. Willett, 28 How. Pr. 225, it appeared that after rendering a judgment a district court justice received proofs that it was a proper case for the imprisonment of the defendant, and made an order for such imprisonment. The Court of Appeals held that District Courts have no power to amend their judgments, that after having rendered judgment the justices of said court are mere ministerial officers, and that the direction made subsequently to the judgment holding the defendant in that case liable to imprisonment was absolutely void. The determination of the right of lien of an attorney needs jurisdiction of an equitable nature involving the making of orders for the payment of money and the deposit of securities or delivery of papers, and compliance with such orders is often enforced by process unknown to Justices' Courts. It is clear, therefore, both upon principle and authority, that the jus-

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tice had no power to vacate the satisfaction piece, and that the clerk properly refused to recognize the order as of any authority whatever. The motion for a peremptory writ of mandamus must, therefore, be denied, with costs.

Motion denied, with costs.

LEONORA H. WELLBROOK, Plaintiff, *v.* HENRY D. OTTEN et al., Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Legacy — When charged upon land — Extrinsic circumstances showing intention.

The will of a childless testator, first, gave legacies in money to his only brother and next of kin and to his adopted daughter, payable after the death of his wife, and, after giving a cemetery lot to the daughter, bequeathed to his wife all the residue of his property real, personal and mixed. Six years later and shortly before his death he, by a codicil, reaffirmed his will and directed that the income of the money legacies should go to and be used by his wife during her life. He did not change his real estate investments between the time of his will and that of his death. His personalty proved insufficient to pay more than two-fifths of the money legacies. The wife is dead. Upon a contest between her devisees and the testator's legatees,

Held, that the language of the will and codicil, as well as the extrinsic circumstances, indicated that it was the testator's intention to charge upon his realty the deficiency of the money legacies.

ACTION for the construction of a will and codicil.

Sidney J. Cowen, for plaintiff.

Bliss & Schley, for defendant Otten.

Edward J. McGanney, for defendant George Hulseberg and wife.

Henry C. Hunter, guardian *ad litem*, for Frederick Howard, Henrietta Wellbrook and Adolph Van Kaas.

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Benjamin E. Hall, for defendant Robert Deickman.

W. C. Percy, guardian *ad litem*, for Wilhelmina Deickman.

RUSSELL, J. The payment of the legacies of $15,000 and $8,000 to the plaintiff and John Hulseberg is resisted by the relatives of the deceased wife of the testator, Conrad Hulseberg, except so far as the personalty paid about two-fifths of each. For full payment a resort to the realty becomes necessary. The extrinsic circumstances furnish the evidence that these legacies are largely ineffective unless the intention of the testator was to charge them upon the realty. The court must, therefore, be guided in the construction of the will by its intrinsic expression and extrinsic application.

The first two disposing clauses of the will are as follows:

"*First.* After my lawful debts are paid, I give, devise and bequeath to my beloved brother, now residing in Germany, the full sum of eight thousand dollars, to be paid to him after the decease of my beloved wife Maria Hulseberg.

"I also give, devise and bequeath to my beloved adopted daughter, Lena Henrietta Wellbrook (wife of John H. Wellbrook), the full sum of fifteen thousand dollars, to be paid to her after the decease of my beloved wife, Maria Hulseberg."

Then, after giving a cemetery lot to the plaintiff, the testator gave, devised and bequeathed to his wife, Maria, all the rest, residue and remainder of his property, real, personal or mixed, and appointed her executrix. The will was executed May 4, 1888, six years before the testator's death. On the 28th of August, 1894, twenty-five days before he died, he executed a codicil "reaffirming my last will and testament, bearing date the fourth day of May, 1888," by which he declared that the net income of the sums given to Hulseberg and the plaintiff should go to and be used by his wife during her natural life.

It will, therefore, be observed that, within the limits fixed by him, the testator clearly intended to give to John Hulseberg and the plaintiff the full sums named without abatement or impairment from any cause whatever; that his wife should enjoy the income of these sums, as well as the rest of the property during her life, so that her interests did not conflict with the payment of the legacies named unless she should be in such want as to

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require absorption of part of the realty — a contingency evidently not contemplated by the testator; and he gives the title to the rest of his property, specifically naming his realty, to his wife absolutely.

The testator, therefore, expressly declared that his wife should only take his real and personal property after the $23,000 of legacies were carved out as there was nothing else to which the term "rest, residue and remainder" could apply except the trifling devise of the cemetery lot. To give to the relatives of the wife now, through her testamentary disposition, the realty left by the testator, would adjudge that the testator did not intend that the wife should take the rest, residue and remainder after the payment of the legacies, but that such residue should be enhanced by the amount of the deficiency between the sum total of the legacies and the net amount of his personal property after payment of debts, taxes and expenses of administration. If the testator had so intended he would plainly have said that he devised his realty to his wife and any balance of his personalty remaining after payment of the legacies.

The extrinsic application of the facts, which discloses the failure of the personalty to provide sufficient means for the payment of the legacies, also discloses strong confirmatory presumptions that the testator meant to provide for full payment of the legacies. The testator in dictating his will necessarily acted upon his own consciousness and perception of the situation as it existed. He was an old man retired from business and an invalid from about the time the will was made. His union with Mrs. Hulseberg had proved childless and neither had any descendants. He had taken the plaintiff when but a few months old and reared her as he would a daughter, both he and his wife giving her the appellation of adopted daughter. She stood to both of them as a child and had no other home than theirs, until she was married. Apart from his wife there was no one so close to him in the tender ties of daily companionship and deliberately assumed fathership. He took no steps to legally adopt the plaintiff, doubtless knowing that he meant to provide for her by testament. There seems to have been no interruption in his loving regard for the plaintiff. The other legatee was his only brother and next of kin. Presumptively he knew that his widow would be left with a larger fortune than that which he possessed. He died

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September 22, 1894; she, three years later, November 6, 1897. Her personalty inventoried $37,967.30 and her realty $15,000 over and above that which she received from him. No one appears to have been dependent upon her, and there is no evidence tending to show any substantial change in the amount of her means from the time of his death till her own, except as she received from his estate. All of the testator's realty was acquired ten years or more before his own death so that there was no change by him from personalty into realty after the making of his will. His personalty was inventoried by the widow as executrix as composed of two mortgages of the value of $11,030 and $96 of household furniture set aside for the widow, and the inventory was duly verified by her. The plaintiff also testifies that this was the extent of the personalty left by the deceased testator. This personalty was reduced by taxes and expenses of administration to $9,339.74, so that the adopted daughter received only $6,663.42, and the brother John $3,553.82. In the absence of any evidence to the contrary it might fairly be inferred that no substantial change existed as to the amount of the testator's personalty from the date of his will until his death, but the codicil affords all the certainty required upon this subject. That codicil was made twenty-five days before he died, and in evident contemplation that death might soon come to this invalid. He reaffirms the provisions of the will and emphasizes his wish that the widow should receive the income of all until her death. He thus readopts the provisions of the former will, as speaking from the date of the codicil, and in view of the then existing situation of his property both personal and real. He was presumably aware that his personalty would pay only about two-fifths of the legacies which he thus reasserted he desired to be fully paid to the legatees after the death of his wife. It would be attributing to the testator a spirit of mockery to suppose that he meant to give these legatees only $9,000 when he solemnly declared that he wished them to receive the full sum of $23,000.

It is a just rule that, where a testator bequeaths legacies and devises his realty, the devisee should not suffer because of a misconception by the testator of the amount of his personalty, and that the legatees must be content with the amounts they actually receive as though those bequests were of specific personal property. But there is no question here as to impaired benefits to the

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wife who was the residuary devisee. He has distinctly asserted that he wished her to take such devise subject to the payment of the legacies in full, and has guarded against the effect of such wish by giving her the income not only of the realty but of the personalty itself. He puts off the day when these legacies shall be paid until that wife shall no longer have need of anything in this life, and when all that she has must pass into hands alien to himself. He could not have desired that those alien relatives of hers should have their benefits large as they were, received through the wife, materially enhanced by the loss of his intended benefits to one who stood to him in the relation of a daughter and to his only brother. These two were not strangers provided for by his bounty, but those whom he would naturally have benefitted, and presumptively have left his estate to had his wife deceased before himself. With the ample provisions for her expenditures, in her own property and what he gave her, she was so fully cared for that it would be injustice to suppose he ever intended that those close to him should suffer not to help her but to benefit her relatives.

The extrinsic situation, therefore, both as to the condition of his property, his wife's property and the claims of those properly and in fact the natural recipients of his bounty, which was present in the mind of the testator in making the will and the codicil, renders as certain as the evidence of circumstances can afford, the presumption that the testator meant that when his wife died this daughter and brother should receive the full benefits he had planned to give them.

The precedents in our courts during the past fifteen years furnish reasonable uniformity of conclusion for the principle that the probable intent of the testator will determine in judging when legacies shall be paid out of the realty, or that the realty shall be used in aid of the deficiency left by the personalty. A power of sale may be a sufficient indication of the intent of the testator to charge the real estate. Kalbfleisch v. Kalbfleisch, 67 N. Y. 354.

A residuary clause is not sufficient to justify the inference of such intent where the bequests are to strangers of the blood of the testator. Bevan v. Cooper, 72 N. Y. 317.

A codicil to a will made six years after the original will, giving power of sale, carries the inference of intent to charge the realty with the payment of legacies where the proof showed that the

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personalty was sufficient at the time of the will to pay those legacies, but had become insufficient at the time of the codicil. Hoyt v. Hoyt, 85 N. Y. 142.

A residuary clause, coupled with a power of sale and a change of the personalty into realty between the making of the will and death, affords the presumption that the testator intended to charge the real estate. Scott v. Stebbins, 91 N. Y. 605.

Such an inadequacy of personalty as could not have been unforeseen by the testator, with a bequest and devise of "The rest of the property" creates a conclusive presumption that the real estate should be charged. McCorn v. McCorn, 100 N. Y. 511.

Where the bequests amounted to $4,500 and the personalty at the time of the will did not exceed $1,500, and the personalty was subsequently depleted by the testator to the amount of $700 in the purchase of realty, the legacies were presumed to be charges upon the realty. Briggs v. Carroll, 117 N. Y. 288.

A will is to some degree ambulatory as to the persons and things with which it deals, but events occurring after its execution can be referred to only as they must have been in possible contemplation by the testator when he executed the will. Morris v. Sickly, 133 N. Y. 456.

The charge upon the realty may be inferred, even though the personalty at the time of the will and of the death were far more than sufficient to pay the legacies, but the will had provided for a division of the personalty at a period earlier than the termination of payments of the annuity legacy provided for. Dunham v. Deraismes, 165 N. Y. 65.

Not one of the cases referred to, nor perhaps any case reported in the books where the testator did not in absolute language charge the realty, presents facts which so clearly demonstrate to a moral certainty, from the will itself and the surrounding circumstances, as the case at bar that the testator intended to devote enough of his property to the payment of legacies to persons for whom he had a tender regard.

The defendants, claiming through the wife and as the recipients of her bounty, cannot repudiate her acts done with reference to the corpus of the property at a time when she was the executrix and the sole owner of all which the plaintiff and the brother John did not take. Nor does the fact that she made a will two days later than the codicil of her husband, and saw fit to benefit the

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children of the plaintiff, militate at all against the presumption afforded by the testamentary acts of her husband.

Judgment is, therefore, directed charging the lands of which the testator died seized with the balance due and unpaid upon the legacies to the plaintiff and John Hulseberg, and for a sale of such real estate, with costs. Counsel and the guardians may submit their views as to the costs of the other parties.

Judgment accordingly.

THOMAS K. GALE et al., Plaintiffs, *v.* THE CITY OF SYRACUSE et al., Defendants.

(Supreme Court, Onondaga Special Term, July, 1901.)

Watercourse — City restrained from further pollution of a creek used for a sewer — Past acquiescence of riparian owner.

Where a city has legally changed the channel of a creek so that it runs in an artificial bed to a neighboring lake, owners of land, which touches the new channel and is wholly bounded by the lake, may restrain the city from building an additional sewer, connecting with the creek and emptying near the owners' land, which will greatly increase the pollution of the creek and lake, it appearing that in spring floods the land is overflowed and large sewage deposits made thereon, which become extremely offensive when the waters recede.

The fact that the riparian owners have acquiesced in the existing pollution of the creek affords no reason why they may not now object to acts of the city which time may ripen into rights.

ACTION for an injunction to restrain the defendants from constructing a sewer through Hiawatha avenue in the city of Syracuse, and from discharging the same into the waters of Onondaga creek at that point.

Lewis & Crowley, for plaintiffs.

W. J. McClusky, for defendants.

ANDREWS, W. S., J. Originally the waters of Onondaga creek ran in a winding channel to the lake through a course considerably to the north of their present location. About 1867, however, the city of Syracuse acquired, under legislative authority, a strip of

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land some 160 feet wide, beginning at a point on the stream known as Maple Elbow and running northwesterly in a straight line to the shore of the lake. A channel was dug through this strip and when completed the waters of the stream were turned into it.

In the year 1883, the plaintiffs' ancestor obtained title to reclaimed lot No. 45 of the Onondaga Salt Springs Reservation, excepting and reserving the land taken therefrom for the New York Central Railroad Company and the land taken to straighten Onondaga creek. This reclaimed lot lay upon both sides of the new channel. It was bounded northerly by the lake and extended southeasterly toward Hiawatha avenue. It did not, apparently, touch the waters of the creek itself except at one point where, as shown by a map offered by the defendants in evidence, a portion of the creek does, for a few feet, flow over the plaintiffs' land.

In 1884, the plaintiffs' ancestor obtained a second parcel of land lying between the first and Hiawatha avenue and bounded on the side toward the new channel of the creek by the land appropriated by the city. This parcel at no point touches the water.

It appears satisfactorily from the evidence that at the present time Onondaga creek is largely used to carry away the sewage of the city; that it and the lake near its mouth are greatly contaminated thereby; that in the spring time the lands owned by the plaintiffs are usually overflowed; that as the waters recede large deposits of this sewage are left thereon, and that later in the season this deposit becomes extremely offensive. It also appears that the city is about to construct an additional sewer through Hiawatha avenue opening into the creek on that street at a point close to the plaintiffs' property. This sewer is to drain a large part of the first and second wards of the city, and if constructed will throw into the stream great quantities of sewage. The inevitable result will be greatly to increase the present pollution of the stream, to pollute the lake where it washes the plaintiffs' property and to increase the deposits left upon this property by the spring floods. This is especially so as it is not claimed that the plans for such sewer contemplate any means for protecting the plaintiffs' lands, even if such means could be adopted.

Under these circumstances I am of the opinion that the plaintiffs are clearly entitled to an injunction.

As to a portion of their property they are, as has been seen,

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riparian owners upon the stream. It flows over their boundary line and they are clearly entitled to prevent its pollution. The fact that they have acquiesced in what has already been done is no answer to this claim. Nor is the fact that the injury done it will be slight. They may object to acts which, by the course of time, will ripen into a right. Townsend v. Bell, 62 Hun, 306; Amsterdam Knitting Co. v. Dean, 162 N. Y. 278.

Nor is the fact that the present bed of the stream is artificial material. It is a natural stream and it must be governed by the rules applicable in such cases. City of Reading v. Althouse, 93 Penn. St. 400; Weatherby v. Meiklejohn, 27 Alb. L. J. 76; Lakeside Paper Co. v. State, 15 App. Div. 169. It also appears that the plaintiffs are riparian owners upon the lake shore. They have a right, as such owners, to object to the further pollution of the lake water, a result which, under the evidence, will necessarily follow upon the completion of the sewer in question.

Further than all this, it is shown that the plaintiffs' lands are subjected to substantially annual floods. For this no one is responsible. The fact that the waters so covering the land already contain refuse appears, but of this fact no complaint is made. The plaintiffs, however, may certainly object to any increase in the injury so done. The defendants have no right directly or indirectly to cast their sewage upon the property in question.

Proper findings may be prepared and if not agreed upon will be settled upon due notice.

Ordered accordingly.

THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, as Trustee, Plaintiff, *v.* THE DOLGEVILLE ELECTRIC LIGHT & POWER COMPANY, JAMES D. FEETER, as Receiver of the Dolgeville Electric Light & Power Company, THE COMMERCIAL BANK et al., Defendants.

(Supreme Court, Onondaga Special Term, July, 1901.)

Electric light and power corporation — Mortgage of after acquired property — Priority of lien — Terms of mortgage — Extension of line.

An electric light and power company, incorporated under the Transportation Corporations Law (L. 1890, ch. 566, § 60), has power to

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execute a trust mortgage, securing its long term bonds, which will cover after acquired property.

The necessity for its having such power stated.

Where a creditor of such a corporation, whose judgment was recovered after the corporation had executed such a mortgage, levied upon wire which it had bought, after such execution, to extend its line but had not yet strung upon its poles, the court held the lien, on the wire, of the mortgage superior to that of the execution, but directed that, on a sale to be had on the foreclosure of the mortgage, the mortgaged property be sold in parcels and the wire last.

Statement of the terms of a mortgage deemed sufficient to cover after acquired property.

Articles of association broad enough to authorize the company to extend its line into an adjoining town of the county.

MOTION to confirm the report of a referee appointed to compute the amount due upon a mortgage made by the defendant, The Dolgeville Electric Light & Power Company, to the plaintiff, as trustee, to secure the payment of $50,000 worth of its thirty-year 6 per cent. coupon bonds, given pursuant to a resolution of its board of directors, and with the written consent, to mortgage, of the owners and holders of more than two-thirds of its capital stock. The mortgage was dated May 1, 1897, was recorded, with the said consent, as a mortgage of real property in the county of Herkimer, July 17, 1897, and in the county of Fulton, September 29, 1900. The bonds were negotiated by the mortgagor in 1897 for value. The mortgagor defaulted in the payment of interest due in 1897 and in 1898, and has continued in default. It was incorporated under the Trasportation Corporations Law. L. 1890, ch. 566, § 60. Its certificate of incorporation contained the following statements, among others: "*Second.*— Its objects are to be manufacturing and using electricity for producing light, heat or power and in lighting streets, avenues, public places and parks, and public and private buildings of the village of Dolgeville in the counties of Herkimer and Fulton, of said State of New York, and in other cities, villages and towns in said State, and of selling such electricity and the light, heat and power produced therefrom, as well as manufacturing and using the same. * * *

"*Eight.*— The names of the town and county in which the operations of the corporation are to be carried on are the Town of Manheim and the County of Herkimer, New York."

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A stock corporation is given power to mortgage by the Stock Corporation Law. L. 1892, ch. 688, § 2.

The granting clause of the said mortgage conveyed:

"All and singular the lands, tenements and hereditaments and the entire plant and property of the said party of the first part (Dolgeville Electric Light & Power Company) described as follows, viz.:

"All the dynamos, beltings, wires, poles, insulators, cross irons, lamps, supplies, tools, structures, fixtures, rights general and special, all franchises, and also all lands, tenements, hereditaments acquired and water rights or water powers or property which may hereafter be acquired for the purposes of the said party of the first part, and all easements thereunto belonging or in any wise appertaining, also all machines shops, buildings, dams, water wheels, erections and fixtures of any kind whatsoever, leaseholds, leases, rights under leases or under contracts, covenants and agreements, terms or parts of terms now held or hereafter to be acquired, for the use of said company or in connection therewith, and also all engines, stock and equipments now held or hereafter to be acquired, and all machinery, poles, equipments, fuel and materials whatsoever now held or hereafter to be acquired, and all other property real, personal and mixed now held or which may hereafter be acquired for said party of the first part, in connection with its business and the operation and maintenance thereof, or as may be convenient or necessary for the uses or purposes thereof, and all rights, powers, privileges and franchises now held or to be hereafter acquired by the said party of the first part connected with or relating to the 'Dolgeville Electric Light & Power Company' for the uses or purposes thereof except the franchise thereof by which the same is incorporated.

"Together with all improvements or additions made or to be made to any or all of said property and estates and their appurtenances by the said party of the first part, or by others; and also all and every other estate, right, title and interest property or thing which the said party of the first part owns and holds or may or shall hereafter acquire, own or hold necessary or convenient for the use, occupation or enjoyment of all or any of the said Electric Light Plant, leases and property, rights, privileges and franchises or any part or portion thereof.

"Together with all and singular the tenements, hereditaments

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and appurtenances belonging to the property hereby conveyed, or in any wise thereto appertaining, and the reversions, remainders, tolls, incomes, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the party of the first part of, in and to the same, and any and every part thereof with the appurtenances; and also all and every other estate, right, title and interest, property and appurtenances which the said party of the first part may hereafter acquire."

On November 23, 1899, the defendant, the Commercial Bank, docketed a judgment in Herkimer county against the mortgagor, and on the same day issued execution thereon to the sheriff who levied upon various personalty, including the wire in suit. He did not sell as his proceedings were stayed. The "adjoining village" referred to in the opinion as the one, in stringing a power line to which the wire was to be used, was Little Falls, in the county of Herkimer. The defendant, James D. Feeter, was appointed permanent receiver of the mortgagor on December 26, 1900, in an action brought by the People against the mortgagor. The sheriff was not made a party defendant to the present action. The complaint herein was verified October 8, 1900.

Parsons, Shepard & Ogden (Robert E. Drake, of counsel), for plaintiff.

John F. Wilson, for defendants Dolge. and others.

McGuire & Wood, for defendant Commercial Bank.

Myron G. Bronner, for defendant Feeter, receiver.

W. & N. E. Kernan, for defendant Walter N. Kernan.

Hiscock, J. This is a motion to confirm the report of the referee appointed to compute the amount due upon the bonds secured by the mortgage of which foreclosure is sought, and to ascertain whether the defendants, or any of them, had or claimed to have some interest in or lien upon the mortgaged premises which was subordinate to the lien of the mortgage and other matters.

The main contest upon said motion, as at the time when the

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reference was ordered, is whether the lien of plaintiff's mortgage or the lien of a judgment and levy secured by the defendant Commercial Bank is superior as to certain personal property acquired after the execution of the mortgage. This property consists principally, in value, of some wire purchased for the purpose of stringing a power line from the defendant's plant to an adjoining village, and which at the time said bank secured its judgment had not been actually strung, but was still in the coils. No question was made, however, that it was obtained for the purpose mentioned, and was about to be strung.

I have no doubt that the terms of the mortgage were broad enough to cover this property and give a lien upon it when it was secured, which would be superior to the lien of said judgment. Neither have I any doubt that the powers of the defendant under its organization were broad enough to authorize its establishing the additional line in question into an adjoining town, assuming that that question can be raised at all in this proceeding. The controversy, therefore, reduces itself upon this point to the simple question whether a corporation like the defendant can, if it desires to, execute a mortgage which will cover after-acquired property. I believe that it can.

It was conceded by the judgment creditor upon the argument that a railroad corporation could give a mortgage which would cover such property, but a distinction was sought between such a corporation and the one in question here.

It was urged that the statutes governing railroad corporations gave them larger powers in this respect than are given to the defendant. Without recourse to any extended reasoning, it seems to me that the statutes under which the defendant was incorporated give sufficient power to enable it to mortgage after-acquired property, and in the construction of such statutes substantially the same reasoning must prevail in favor of recognizing the necessity of such powers in the case of one corporation as in the case of the other. The mortgage in question, as must generally happen in such a case, was executed to secure bonds running for a long period of time, and liable to be scattered in the hands of many holders. It probably was executed, and said bonds issued (and in most cases a similar course would be followed), for the purpose of securing money with which to build and equip a plant. Every corporation of the same class as that to which defendant

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belongs will, at least if it is successful and prosperous and thrifty, desire from time to time to extend its plant, purchase more modern machinery and replace old and worn out construction with new construction. It becomes practically a matter of public necessity that if bonds such as those involved in this action are to be available and merchantable in the public market, they must be secured through the lien of a mortgage upon such extensions and new property. No other course is practicable, if the security and standing of the bonds is to be maintained. If this course is not allowed, the more prosperous and more progressive a corporation issuing the bonds becomes, the less valuable the security of the latter through interchange of old property for new.

While it was urged by the counsel for the bank that the point was not expressly involved in some of the cases cited by plaintiff's counsel, the reasoning found in New York Security Co. v. Saratoga Gas Co., 88 Hun, 569, seems to be applicable and forcible.

There seems to be no reasonable objection to following the suggestion made in behalf of the judgment creditor that the property covered by the mortgage should be sold in parcels, the personal property in question covered by the lien of the judgment being sold in a parcel by itself and last, and the judgment will so provide.

Judgment accordingly.

HERBERT C. PELL, Plaintiff, *v.* CHARLOTTE L. PELL et al., Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Deed — Words passing the fee in a highway.

The law presumes that a grantor who conveys lands upon a public highway does not intend to reserve the fee of its bed and this presumption can only be rebutted by clear and decisive language.

A conveyance of a farm in the city of New York, divided by the Greenwyck road running northerly and southerly, which, after conveying separately the part west of the road and the bed of the westerly half of the road, conveys the part east of the road by a description, in courses and distances, "beginning on the east side of Greenwyck road at the northwest corner of the land of Lewis Scott (adjoining on the south) * * * and is known in a division

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of the estate of Jacobus Van Orden, deceased, by lot number 2, and is bounded * * * to the westward by Greenwyck road" sufficiently conveys to the grantee the fee of the bed of the easterly half of the road.

MOTION to compel a purchaser at a partition sale to complete his purchase.

P. Chauncey Anderson and William Temple Emmet (E. Ellery Anderson, of counsel), for plaintiff.

Arthur Knox, for purchaser.

BLANCHARD, J. This is a motion to compel a purchaser at a partition sale to complete his purchase by making the necessary payment and accepting the deed tendered. The purchaser refuses to do this, alleging that the deed tendered does not convey to him a good and marketable title. The premises in question are known as No. 483 Eighth avenue in the borough of Manhattan, city of New York, and are situated on the west side of Eighth avenue, twenty-four feet nine inches north of Thirty-fourth street and have a depth of one hundred feet and a width of twenty-four feet eight inches. The rear of the premises includes the easterly half of what was formerly known as the Greenwyck or Fitzroy road and also a portion of the westerly half of said road. The purchaser refuses to complete, because he claims that the referee cannot give title to that portion of the premises which formerly was included in the easterly half of this road. The facts concerning the title so far as they appear from the papers submitted on this motion and affect the question raised are as follows:

The premises in question formed part of a farm situated on both sides of this old Greenwyck or Fitzroy road, and prior to 1782 was the property of one Jacobus Van Orden, who died seized of it in that year, leaving a will which was probated in New York county. By this will, the farm was devised to his daughter, Magdalena, wife of Thomas Tibbett Warner, and was conveyed by the said Magdalena Warner and her husband to John Watts, by deed, dated May 3, 1791, and recorded February 24, 1797, in Liber 55 of Conveyances, page 356.

By this deed, the farm was conveyed by two separate descrip-

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tions, one describing the property west of the Greenwyck road and the other the property east of the road. It is not questioned here but that the description of the property west of the road carries with it the fee of the bed of the road to the center thereof, but it is claimed that the description of the property east of the road did not convey the fee of the other half of the bed of the road. The road was subsequently and in 1834 closed under proceedings taken by the city of New York pursuant to an act of the Legislature passed April 20, 1818. Although the city of New York by quit-claim deed conveyed the easterly half of the road thus closed to the then owner of the property abutting the said road, it seems to be conceded here that no rights to the fee of the bed of the road vested in the grantee under such conveyance. The purchaser contends that the fee of the bed of the easterly half of the road thus closed reverted to the heirs of Magdalena Warner, because the description in the deed above referred to of the land on the easterly side of the road did not include the fee to the center of the road.

The plaintiff on the other hand contends that the description was sufficient to include the fee to the one-half of the road abutting the property, and that, therefore, the referee's deed conveying the title of the parties to the partition suit was a proper conveyance of a good title to the entire property. The important question, therefore, to be determined is: Was the fee to the easterly half of Greenwyck road conveyed under the description of the land on the easterly side of the road in the deed from Magdalena Warner to John Watts, in 1791?

This description is as follows: "All that certain other lot, piece or parcel of land, *beginning on the east side of Greenwyck road at the northwest corner of the land of Lewis Scott,* directly opposite to the southeast corner of the land above conveyed, and runs thence south, 60 degrees east, 12 chains and 75 links to land of Isaac Schultz; thence along his land north, 29 degrees east, 15 chains 40 links, and thence north 59 degrees west, 13 chains and 15 links to the Greenwyck road aforesaid; thence along said road south, 17 degrees west, 2 chains; south 30 degrees and 30 minutes west, 12 chains and 90 links; south, 31 degrees, and 30 minutes west, 82 links, containing 19 acres, three rods and 36 perches, more or less and is known in a division of the estate of Jacobus Van Orden, deceased, by lot number 2, and is bounded to the east by lot

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number 1, now belonging to Isaac Schultz, to the westward by Greenwyck road, to the northward by land of Isaac Varian, and to the southward by land of Lewis Scott, as the same was surveyed and laid out in the year 1786, by Casimer Goerck, surveyor."

There is a strong and well recognized presumption in law that a grantor who conveys property upon a public highway, does not intend to reserve to himself the fee of the bed of such highway, and the rule is that it requires clear and decisive language showing a contrary intention to rebut such presumption. Holloway v. Southmayd, 139 N. Y. 400; Matter of Ladue, 118 id. 219; White's Bank v. Nichols, 64 id. 71.

The force of this presumption in the present case is intensified by the fact that the grantor conveyed the property on the westerly side of the road, by language which the law holds indicative of the intention to convey the bed of the road. It would, indeed, be strange, if having in the same instrument conveyed the fee to one-half of the bed of the road, he should retain the fee to the other half when he conveyed to the same grantee the land on both sides of the road.

While it is true, as the purchaser contends that the designation of the "side" of the road, is held to exclude the fee to the soil of the abutting road, it will be here observed that the starting point of the description is not simply a point on the "side" of the road, but the side of the road "at the northwest corner of the land of Lewis Scott," which land adjoins the property conveyed on the south. If therefore, the land of Lewis Scott ran to the center of the road then the description here employed, must be held sufficient to include the fee to the center of the road. Matter of Mayor, 20 App. Div. 404; affd. 155 N. Y. 638. The description of the Scott property to the south makes the starting point as "the southwestermost corner of the land of Jacob Van Norden lying on the same side." We are thus left in doubt as to whether or not the Scott property on the easterly side of the road included the fee to the adjoining road to the center thereof.

The starting point of the property involved in this case is, therefore, so far as the particular portion of the description under consideration is concerned, left open to uncertainty, but this uncertainty is cleared away, when the latter portion of the description is considered. It is there stated that the property is known as lot No. 2 in "the division of the estate of Jacobus Van Orden, de-

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ceased, * * * and is bounded * * * to the westward by Greenwyck road." It is well settled that this description is sufficient to pass the fee of the bed of the road to the grantee. Gerard's Titles to Real Estate (4th ed.), p. 510. By assuming the northwest corner of the Scott property as the center of the road and that point as the starting point, the entire description can be harmonized. From the facts in this case I conclude it to have been the intention of the grantor to have conveyed the fee to the bed of the road adjoining the property on the easterly side of Greenwyck road. At least I see nothing in the description employed to overcome the legal presumption that the grantor intended to convey to the center of the road.

The plaintiff produces a number of affidavits in support of the record title, showing a title by adverse possession. The sufficiency of the proof on this phase of the title does not seem to be questioned by the purchaser, except that it is claimed that there is no proof that Magdalena Warner is dead, neither it is shown who her heirs are, if dead and whether or not such heirs are of full age or of sound mind. I think, however, that the lapse of time in this case is an answer to such contention. Faile v. Crawford, 30 App. Div. 536; Hamershlag v. Duryea, 58 id. 288; Ottinger v. Strasburger, 33 Hun, 466.

The title is, therefore, in my opinion, such a one, as the purchaser was obliged to take and the motion should accordingly be granted.

Motion granted, with ten dollars costs.

LENA MIERS, Plaintiff, *v.* SAMUEL MIERS, Defendant.

(Supreme Court, New York Special Term, July, 1901.)

Action for a separation — Alimony and counsel fee.

Where a wife brings an action for a separation and for support and her affidavits indicate that her husband's course of conduct towards her has justified her in leaving him and entitles her to live apart from him, the rule that she should apply to the police courts for support will not be applied, as she in such case is entitled to alimony, as distinguished from mere support, and to a counsel fee to prosecute her action, relief which the police courts cannot give.

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MOTION for counsel fee and alimony, in an action brought by the wife against the husband for separation and support.

Alexander Rosenthal, for plaintiff.

Charles L. Hoffman, for defendant.

BLANCHARD, J. This is a motion for counsel fee and alimony in an action brought by the wife against the husband for separation and support out of his property. They intermarried in 1873: eight children have been born of the union, three of whom are now deceased and the five remaining are self-supporting. A score and a half of affidavits are presented on the motion. Those on the part of the wife reveal a story of neglect and cruelty by the husband, beginning three or four years after their marriage and continuing to a recent date, which no wife should be required to endure and no self-respecting woman would tolerate. She alleges that her husband's business was that of a merchant tailor, and during the first few years of their married life she worked with him and helped to lay the foundation of his present means; that he is a wealthy man, the owner of real estate, and for many years transacted a large business, is interested in local politics and poses as a rich and influential citizen, and spending upon himself for his own pleasure $10 or $15 per day. She specifically alleges that during their married life they have moved upwards of thirty times, and all the labor of fixing up the new home has fallen upon her; that for twenty-five years, although financially able to do so, he never kept a servant for her, and, for years at a time, came in and went out of the house without speaking to her, and treating her as a servant. In 1877 he stayed away from home three months, without provocation, sending her $7 per week for the support of herself and two children. In 1893 he remained away ten months, without provocation, and sent her $10 per week for the support of herself and five children; that on numerous occasions he stayed away from home for short periods such as two weeks, three weeks and six weeks, going and coming as he liked, and from 1897 to 1899 he never spoke to her; that during such absence he lived at a high rate and in an expensive style, and that he compelled her to live in cheap apartments poorly furnished, with barely sufficient money for the meager necessities of life, with very little for

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clothing and nothing for amusement; that he assaulted and struck her, and when in April, 1901, he reduced her allowance for the household to $2 per week she threw herself on the bounty of her married daughter and son-in-law and abandoned her house and went to live with them. Some of these alleged acts are confirmed by the affidavits of the son-in-law, two daughters and others. The defendant interposes a general denial to nearly all of the allegations of the plaintiff and a particular denial of many of them. He alleges that he has been a kind husband and father, provided for his family in a liberal manner according to his means, which he claims are small; that his wife was very often out late at night, and at times remained out all night, without explanation, and he naturally found fault with such conduct; that the only explanation he can give for her leaving him is that she might have complete liberty to do as she pleased. In the mass of assertion and contradiction before me it is quite impossible to tell with accuracy wherein lies the truth, and only the sifting process of a trial will bring it to view. However, the plaintiff is entitled to an adequate fee for her counsel to enable her to properly prepare for the trial and present her case, and to support until the trial shall determine her rights. This court has in some instances followed a Special Term decision of the Superior Court of the city of New York (Patton v. Patton, 13 Misc. Rep. 726), to the effect that alimony and counsel fee should not be granted in separation cases. The foundation of that decision seems to have been another Special Term decision of the same court. Ruoff v. Ruoff, N. Y. L. J., March 29, 1894. The ground of this latter decision seems to have been that an adequate remedy exists by summary application to the police courts. Possibly in those cases ample relief could have been afforded by those courts, but in many cases the relief which those courts have the power to give is entirely inadequate. The remedies are not identical. The police courts have no authority to award a counsel fee to the attorney for the wife where she is, in a proper case, entitled to conduct a suit for a legal separation. A wife may not only be entitled to support for herself and children, but likewise to an adjudication of a competent tribunal that she may live separate and apart from her husband and without molestation from him, where he has given the necessary cause, and in such a case she is undoubtedly entitled to be furnished with the means to conduct such suit. Again, the Magistrates' Courts have

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no power to decree that the husband shall support his wife, except where he abandons her and in consequence she is likely to become a public charge. Greater New York Charter, § 685. It does not cover the case in which the husband by cruel and inhuman treatment or by a course of conduct equivalent thereto necessitates a self-respecting woman to leave him. There the husband does not abandon the wife, but the wife abandons the husband. In the present case the course of conduct of the husband was such, in my opinion, as to justify the wife in leaving him, and the decisions cited ought not prevent justice from being done. While they may have been correct, so far as the facts therein presented are concerned, they ought not to be broadened to the extent of becoming a principle to be adopted in all cases where alimony and counsel fee are sought in an action for separation. Each case should be judged on its own facts. In the present case my judgment is that the plaintiff should receive a counsel fee of $250 and alimony of $12 per week. The motion is granted.

Motion granted.

ELLEN M. FENTON, Plaintiff, *v.* DENNIS FENTON et al., Defendants.

JOHN WHALEN et al., as Executors, etc., of THOMAS FENTON, Deceased, Plaintiffs, *v.* ELLEN M. FENTON et al., Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Express trust — Form — Suspension of power of alienation — Gift of a house, the furniture and "all the contents" does not include securities in a safe — Election as to dower.

A testamentary direction to executors, as trustees, "To invest and keep invested so much of my said estate as may be personal, and to collect and receive the rents, issues, incomes and profits of so much of my estate as may be real property and to pay over after deducting all lawful expenses the net income arising from my property both real and personal" to certain beneficiaries named, creates, as to the realty, a valid express trust of the third class mentioned in the statute (L. 1896, chap. 547, § 76, subd. 3).

The validity of a trust, created for two lives in being only, is

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not affected by the fact that a number of persons may be its beneficiaries during the term.

A testator, who had given legacies of $36,000, married again and, by a codicil to his will, in which he expressed a desire that his will, except as limited thereby, should continue in full force and effect, gave his second wife his dwelling house, "the furniture and all the contents thereof." A safe therein was found to contain securities to the extent of $114,000 and, beside these, he had only sixty dollars of personalty.

Held, that the second wife was not entitled to the contents of the safe and, further, that they were not consonant with "furniture".

Where the provisions of a will are not inconsistent with dower the widow is not put to an election.

ACTIONS for dower and for the construction of a will.

Stern & Rushmore (Eldon Bisbee, of counsel), for Ellen M. Fenton.

James A. Dunn, for executors of Thomas Fenton.

Patrick H. Whalen, for Dennis Fenton.

Vincent P. Lynott, for Michael Cronican.

CHESTER, J. These actions may be considered together. The first is one brought by the widow of Thomas Fenton, deceased, for dower. The second is brought to procure the construction of his will. He died September 26, 1899, seized of premises known as 502 West One Hundred and Sixty-first street, New York, where he resided at the time of his death; of another house and lot situated on the southwest corner of Amsterdam avenue and West One Hundred and Sixty-first street, and also of two vacant lots on the northwest corner of One Hundred and Sixty-ninth street and Audubon avenue in the city of New York. He left no children. He left a will bearing date, the 26th day of August, 1897. In this will after making provision for his debts, funeral expenses and expenses of administration and giving an aggregate of $36,400, in fifteen legacies to various collateral relatives, friends and charities, he gave all the residue of his estate to his executors in trust, by the following clause, viz.:

"*Seventeenth.* All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath to my executors

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hereinafter appointed, in trust, nevertheless, for the following uses and purposes:

"To invest and keep invested so much of my said estate as may be personal, and to collect and receive the rents, issues, incomes and profits of so much of my estate as may be real property and to pay over after deducting all lawful expenses the net income arising from my said property both real and personal, equally, share and share alike, to my sister-in-law Betsy Fenton of Tenniscart, County Waterford, Ireland, and my sister, Mrs. Terence Ahern, of Lismore, County Waterford, Ireland, during the lifetime of my niece, Julia Ahern and of my nephew Michael Ahern, children of Mrs. Terrence Ahern, and it is my will that in case either or both my sister-in-law, Betsy Fenton and my sister Mrs. Terrence Ahern should die before Julia Ahern and Michael Ahern are both deceased, then the heirs at law of my said sister-in-law or my said sister so dying shall take of the net income of my said estate the share of the one so dying *per stirpes* and not *per capita,* and on the death of both Julia Ahern and Michael Ahern I direct my executors, or the survivor of them, to pay over the whole of my said residuary estate to my nephew, Patrick Fenton, son of Betsy Fenton, of Tenniscart, County Waterford, Ireland, absolutely and forever, and in the event that my said nephew Patrick Fenton should die before the death of the said Julia and Michael Ahern then and in that event I direct my executors hereinafter appointed upon the death of said Julia Ahern and Michael Ahern to pay over the whole of my said residuary estate absolutely and forever to the lawful issue of my said nephew Patrick Fenton, if any such surviving there be, at the time of the death of the said Julia and Michael Ahern, as aforesaid, and in the event that there be no issue of my said nephew Patrick Fenton surviving at the time of the death of the said Julia and Michael Ahern, then it is my will and I hereby direct that my said executors hereinafter appointed pay over the whole of my said estate on the death of the said Julia and Michael Ahern as aforesaid to the heirs-at-law of my said nephew Patrick Fenton, son of Betsy Fenton, absolutely and forever."

After making this will, and on the 12th day of October, 1898, he married as a second wife, the plaintiff in the first entitled action. Four days before his death he made a codicil, of which the following is a copy:

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"*Know all men by these presents,* That I, Thomas Fenton, now residing at No. 502 West 161st street, New York city, having heretofore made a last will and testament which I wish to have continue in full force and effect, excepting that by and in the codicil as hereto set forth, I do hereby make, publish and declare this instrument to be as and for a codicil to the aforesaid last will and testament.

"*First.* Any grant, devise or bequest that I may have made in said last will and testament to any person or persons in trust or otherwise of the premises No. 502 West 161st street, New York city, and all the contents of every kind and nature therein contained I do by this my codicil revoke, nullify and make void, and I now will that the said premises No. 502 West 161st street and the furniture and all the contents thereof together with the strip of land on the easterly side of said house and lot, being five feet front and rear and running the depth of twenty-five feet shall descend to my wife Ellen M. Fenton to her own use, absolutely and forever; and I therefore now give, devise and bequeath to my said wife Ellen M. Fenton the aforesaid premises, with the said strip of land and all the contents of said building and premises to her own use absolutely and forever.

"*In witness whereof,* I have hereunto set my hand and seal this 22nd day of September, 1899.

"THOMAS FENTON, [L. S.]"

On the day before his death he made a second codicil, wherein he refers again to his last will and testament which he wishes "to have continue in full force and effect." In this codicil he nullifies the devise to any person in trust or otherwise of his house and lot situated on the southwesterly corner of Amsterdam avenue and West One Hundred and Sixty-first street, New York, and devises the same to his nephew Dennis Fenton, "absolutely and forever."

After his death the furniture in the residence devised by the codicil to his wife was appraised at the sum of $50, and his wearing apparel and jewelry at the sum of $10. Among the furniture was a small safe. Upon this being opened it was found to contain a United States bond for $1,000, several bonds secured by mortgages on real estate, aggregating $20,000 in amount, 30 separate savings bank deposit books, showing deposits of upwards of

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$80,000, a pass book in another bank showing deposits of upwards of $10,000, and cash to the amount of $2,704. This personal property had a value, all told, of $114,368.76.

The widow insists that it was the intention of the testator by the first codicil in devising to her the premises No. 502 West One Hundred and Sixty-first street, and bequeathing to her "the furniture and all the contents thereof," to give her all of the personal property found in the safe in that house, as well as the furniture. She also alleges that the trust mentioned in the seventeenth item of the will is void for uncertainty and indefiniteness; that it is not one for a purpose for which an express trust may be created, and that there is an unlawful suspension of the power of alienation.

An examination of the provisions of the seventeenth clause convinces me that the trust there created is a valid one. The statute authorizes the creation of an express trust "to receive the rents and profits of real property and apply them to the use of any person during the life of that person or for any shorter term, subject to the provisions of the law relating thereto." Laws of 1896, chap. 547, art. 3, § 76. The clause of the will to be construed follows the language of this statute very closely. The gift to the executors, in trust is, "to collect and receive the rents, issues, incomes and profits of so much of my said estate as may be real property and to pay over, after deducting all lawful expenses, the net income arising from my said property, both real and personal," to the beneficiaries therein named. It is not necessary that the purpose of a trust should be declared in the exact words of the statute. It is sufficient that a purpose within the statute is clearly embraced within the language used. That appears clearly to be the case here. Vernon v. Vernon, 53 N. Y. 351-359; Donovan v. Vandemark, 78 id. 244, 248.

Nor is there an unlawful suspension of the power of alienation. The trust is limited in any event to two lives in being; that is, to the lives of Julia Ahern and Michael Ahern, and, therefore, does not offend against the provision of the statute in that respect. The fact that a number of persons may be beneficiaries during the continuance of the two lives, and during which the power of alienation is suspended, does not impair the validity of the trust. Woodgate v. Fleet, 64 N. Y. 571; Bailey v. Bailey, 97 id. 460.

I am unable also to find any element of indefiniteness or uncer-

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tainty in the trust. The language is clear; the trust is to continue during the lives of but two persons, Michael and Julia Ahern, with a beneficial interest in a sister-in-law, Betsy Fenton, and a sister, Mrs. Terence Ahern, and, upon their deaths, to their respective heirs-at-law, with remainder to a nephew, Patrick Fenton, with suitable provisions providing for the contingency of the death of Patrick prior to the death of Michael and Julia. I conclude, therefore, that there is nothing here that contravenes the statute, and that the trust is valid.

The next question to be determined is whether the widow is entitled, under the bequest to her of the furniture and the contents of the house, to take the bonds, mortgages, bank-books and cash found in the safe in the house, to the exclusion of all of the several legatees named in the will as originally drawn.

It is a primary rule of construction that the intention of the testator must control, if that can be gathered from the will and the surrounding circumstances. To get at the intention, the entire will must be taken into account, and effect must be given to all its provisions, if that is possible.

Here the testator had made a will before his marriage to his second wife. In that he had given substantial bequests to numerous near relatives and friends and to several charities. Practically, his entire personal estate was represented by the cash, bank-books and securities found in the safe. In the first codicil made after his marriage, in which he willed the house where he lived to his wife, "and the furniture and all the contents thereof," he refers to his last will and testament and expresses his wish to have that "continue in full force and effect." He also expresses the same desire in the second codicil in referring to his will. If, under the term "contents" used in the codicil, all his personal property found in the safe is held to go to his widow, then no force nor effect is given to his will as originally made, for there will be no estate left to pay any of the legacies therein given or to create the trust estate therein provided for. His solicitude to have his will kept in full force and effect, expressed as it was in both of these codicils, is very convincing in showing that the testator did not intend, by the use of the word "contents," to give his entire personal estate to his widow and thus leave in the hands of his executors no fund which could be applied by them to the legacies given or the trust created in the will.

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It is true that the word "contents" is broad enough to include the bonds, mortgages, bank books and cash, and while the court might be justified in giving it that meaning to prevent intestacy, yet where, as here, there is a residuary clause and, consequently, no question of intestacy involved, that phase of the case may be eliminated from consideration in construing this will.

The testator's intent, not to give the word the broad meaning claimed for it by his widow, being so manifest from an examination of the will and codicils together, the case might properly be resolved against her for that reason alone. But the current of authority in construing wills very similar in character to this seems to me to be conclusive against her contention.

The rule, in brief, as well stated by the learned justice who decided the recent case of Ludwig v. Bungart, 33 Misc. Rep. 177, is, "that in the construction of wills when certain things are mentioned or enumerated in a bequest, followed in the same clause by a more general description, that description is taken to cover only things of a like kind with those mentioned or enumerated; and this is so because it is presumed the testator had only things of that class in mind. Jarman, Wills, 709 and n.; Dole v. Johnson, 3 Allen, 364; Bills v. Putnam, 64 N. H. 554. The general phrase, 'contents of house', following the specific one of 'household furniture', must therefore be confined to matters *ejusdem generis.*" Matter of Reynolds, 124 N. Y. 388; Ball v. Dixon, 83 Hun, 344, are cases to the same effect.

To carry into effect the testator's intent and to give force to the authorities referred to, it must be held that the personal property, cash and securities found in the safe go to the executors to be disposed of as provided in the will, and not to the widow.

With respect to the remaining question, I discover nothing in the will or codicils, which is inconsistent with the widow's claim for dower. The provision for her benefit is not made in lieu of dower, and, although she has entered into possession of the house devised to her, that fact is not a waiver on her part of any rights given to her by law. She was not driven to an election between the provision contained in the will for her benefit and her dower. It is urged here that because the testator specifically devised one parcel by the last codicil to his nephew, Dennis Fenton, "absolutely and forever," and that he devised *all* of the residue of his

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estate upon certain trusts, that these provisions are inconsistent with dower. I cannot see that that is so.

The fact that he devised the house to Dennis Fenton is not of itself inconsistent with dower, for the reason that the testator had no control over the dower and could not dispose of that by will any more than he could have disposed of the right of a mortgagee of the property. In either event, the devisee must take it subject to the incumbrance. Closs v. Eldert, 30 App. Div. 338.

Nor can the terms "absolutely and forever," used by the testator in the devise of this real estate to Dennis Fenton, be effective to defeat his widow of her dower therein. These words characterize the quality of the estate which the testator devised, and merely show an intention to give an absolute fee as distinguished, for instance, from a life estate or from some other qualified fee, and cannot be held to devise something which the testator had no right to give.

Neither is the devise to the executors in trust of *all* of the residue of the testator's estate inconsistent with the right of dower. The right of dower was no part of his estate, but is an estate which the law gives to the widow free from the control of the husband, and this estate can only be taken away from her by her consent. While he could put her to her election by the use of proper terms in his will between her right of dower and a provision for her benefit in the will, yet he has not done so in this instance, and, therefore, she is entitled to both her dower and the provision made for her benefit. Konvalinka v. Schlegel, 104 N. Y. 125; Gray v. Gray, 5 App. Div. 136; Kimbel v. Kimbel, 14 id. 570; Duncklee v. Butler, 30 Misc. Rep. 61.

The stipulations made by counsel in open court as to the correct names of the corporations intended by the testator to be beneficiaries under his will may be given full force and effect in the judgment, as all the parties are of full age.

The plaintiff is entitled to judgment for the admeasurement of her dower in the first-entitled action, with costs; and the plaintiffs in the second action are entitled to a judgment construing the will in harmony with this opinion, with costs to the plaintiffs and to all answering defendants, to be paid out of the estate.

Judgment accordingly.

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LOUIS RATZEL, Plaintiff, *v.* THE NEW YORK NEWS PUBLISHING CO. and IDA E. WOOD, Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Libel — Per se, in regard to the capacity of an advertising agent — Demurrer overruled.

A complaint which alleges that the defendant published in regard to the plaintiff, an advertising manager, a statement that he, with others of its employees, had been dispensed with, that the reason for the change was their general careless manner of attending to the business, and that their places would be filled with competent parties who would attend to the affairs in a more business-like manner, is not demurrable as failing to state a cause of action, since the words, written of, and tending to injure the plaintiff in, his business, are libelous *per se*.

DEMURRER to complaint.

M. J. Stein, for plaintiff.

W. J. Fanning, for defendants.

CLARKE, J. This is a demurrer by the defendant, The New York News Publishing Company, to the complaint in an action for a libel, upon the ground that it does not state facts sufficient to constitute a cause of action.

Although the complaint is voluminous, but one cause of action is set forth: all other matters being merely of inducement. It is alleged that plaintiff had for many years been in charge of the advertising department of the defendant company, and was known as its advertising manager, and had for many years been known amongst newspaper fraternities and institutions, firms, and others, and newspapers, agents and advertising concerns in the city of New York, and elsewhere as a capable, competent, and careful advertising manager and skilled in the business of advertising; that he was discharged without cause or provocation, and that thereafter the defendants composed, wrote, published and circulated throughout the advertising community, and more especially

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to a number of specified persons engaged in the trade, calling, and profession of advertising, the letter, publication, composition, and document set forth, containing the following clause: "We wish to notify you that there has been a number of changes in the business staff of the *Daily News*. Mr. Louis Ratzel, chief clerk * * * and others have been dispensed with. The reason of the change was a general careless manner of attending to our business. Their places will be filled with competent parties, who will attend to our affairs in a more business-like manner," and the complaint further alleges "thereby meaning, intimating and insinuating and causing the aforesaid persons and people generally to believe amongst the trade, calling and profession of advertising that the plaintiff herein was unfitted, unskilled and incompetent in his trade or calling and in his business and that the plaintiff was a careless person, unfitted, unskilled and incompetent to transact any and all business appertaining to and relating to the trade or calling of advertising," and so forth. The complaint further alleges that "each and every of the aforesaid letters, documents, printings, publications and circulations * * * wherein the plaintiff was by intimation or inuendo or otherwise accused or charged of being incompetent, unskilful, unfit, incapable, careless, dishonest or untrustworthy in the pursuit of his business, trade, calling or occupation or in his character are and each of them is wickedly and maliciously false and untrue."

From the allegations above set forth, it is quite clear that the complaint sets forth as a cause of action words published in relation to the business, trade or profession of the plaintiff, and that such words in such connection are libelous *per se*. To assert falsely of a clerk or other employee that he has been discharged because he was generally careless in the transaction of the employer's business, and that he was incompetent, could not fail to injure him in his search for a new position, and even prevent his obtaining one.

It is too well settled to need citation that words spoken in relation to a man's trade or business may be libelous *per se*, even though such words, if spoken or written of an ordinary person, might not. The law allows this form of action not only to protect a man's character as such, but to protect him in his occupation also against injurious imputations. It recognizes the right of a man to live and the necessity of labor, and will not permit

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one to assail by words the pecuniary credit of another except at the peril, in case they are untrue, of answering in damages.

The principle is clearly stated by Bayley, J., in Whittaker v. Bradley, 7 Dowl. & R. 649: "Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable." When proved to have been spoken in relation thereto, the action is supported, and unless the defendant shows a lawful excuse the plaintiff is entitled to recover without allegation or proof of special damages, because both the falsity of the words and resulting damage are presumed. Moore v. Francis, 121 N. Y. 199.

Demurrer overruled, with costs, with leave to answer upon payment thereof.

Demurrer overruled, with costs, with leave to answer.

WILLIAM E. ISELIN et al., Plaintiffs, *v.* MOSES F. GOLDSTEIN and MAYER NEUBERGER, Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Creditor's action — Fraudulent preference — Books not produced — Debtor's subsequent voluntary bankruptcy.

Circumstances sufficiently showing that a transfer made by a failing debtor to his father-in-law, when taken in connection with the acts of the latter in the premises, was not an honest preference to a just debtor, within our statute.

The failure of both parties to produce or account for the absence of their books of account is a suspicious circumstance.

Where defrauded creditors of the debtor have timely begun an action to set aside the transfer, their equitable lien cannot be affected by the debtor's subsequently taking proceedings to have himself declared a bankrupt, as his trustee takes only the residuum.

ACTION by judgment creditors of defendant Goldstein to set aside the transfer of a large amount of accounts, made on eve of said Goldstein's failure.

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Blumenstiel & Hirsch (A. Blumenstiel, of counsel), for plaintiffs.

Platzek & Stroock, for defendant Neuberger.

David B. Cahn, for defendant Goldstein.

RUSSELL, J. The plaintiffs, judgment creditors of Goldstein, seek to set aside his transfer to his father-in-law Neuberger of a large amount of accounts made on the eve of Goldstein's failure. On the 4th day of November, 1895, Goldstein assigned accounts owing him to the amount of $20,112.52, being all that he had of any value, and, on the 6th of November, the fifth being election day, consented to judgments in favor of his sister-in-law, Helen Rosenberg, for $2,087.10, and his brother-in-law, Leo Loeb, for $7,736.50, on which judgments speeedy executions were issued, and his business stock of goods of hosiery and underwear at 456 Broadway, New York city, was sold out, and, on the same day, he drew out his balance of cash in the Chemical National Bank of $1,800; by which means he denuded himself of his entire property, leaving entirely unpaid the general creditors who had furnished him the merchandise, the proceeds of which went apparently to his brother-in-law and sister-in-law, and out of which the accounts came which were assigned to his father-in-law, to the amount of $49,000, entirely unpaid. He had previously, on the twenty-fourth and thirty-first of October, drawn from the Chemical Bank the sums of $1,150 and $5,000.

These naked facts require some explanation from the lips of those into whose pockets more than $25,000 in cash is traced. That explanation is sought to be given by the proof tendered of an honest preference by a failing debtor to just creditors for moneys advanced.

It is very true that, aside from the provisions of the General Bankrupt Act of the United States, such preferences may be made. But the right to give and take preferences cannot lie upon a corrupt foundation. The course of the honest debtor, succumbing to unmerited misfortune, bears clear exposure to the light. He has tried to make a success of his business operations, and, even though ruin may come from possible want of skill or energy, not a step of his career is marked by any scheme designed

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to throw shadows upon his business acts so that they may be concealed from inspection. He keeps books of accounts showing of whom he buys and to whom he sells; of the sums borrowed from individuals and banks; of the various ways in which his moneys are paid out, as well as received, and of every transaction of debit and credit, which may be read in plain figures in after months and years.

Such books are essential for his own safety, even though he has no suspicion of failure. He cannot settle with creditors or debtors for goods bought or sold, or know his own standing from day to day, without them. Another presumption is added to their necessity in a case like this. Knowing, as Goldstein did, the approaching end of his business transactions, unless conducted under the cover of another's name, and of his own desire to benefit his near connections with all that he had, to the absolute loss of his creditors, he knew well that scrutinizing inquiry would be made as to his business operations, and the state of accounts between himself and those connections, out of which they claimed to absorb his all.

Yet, in the face of all this, he conceals the light which his books would afford. He admits the possession of the usual books of account, including cash books and check books, but refuses to give even a plausible explanation of what has become of them. And so there is not one particle of evidence that his books showed any entries of the receipt of the various sums claimed to have been loaned him at various times by his father-in-law, sister-in-law and brother-in-law, to the amount of some $20,700, or of $10,000 loaned to him by his other brother-in-law, Herbst, as claimed at the close of the trial for the first time, and then offered in the effort to account for his withdrawal of $5,000 four days before the failure.

Nor does the defendant father-in-law, Neuberger, present upon this trial a much better disposition to throw light upon those business relations with his son-in-law, except as the shafts disclose such partial views of the situation as may suit his prepared case. He claims to have made, from the second day of January, 1891, to the twenty-sixth day of October, 1893, to his son-in-law, Goldstein, nine loans, partly in currency and partly by checks, of which the smallest was $700 and the four largest $2,000 each. His books, too, are not to be found, although he was the senior mem-

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ber of the business firm of M. Neuberger & Co. He does not say they are destroyed, but they cannot be found. They may possibly have been sold to be manufactured into pulp. The very inadequacy of explanation that his firm had sold books of account showing transactions of recent years yet pending, and their daily course of business yet lapping over into the future, demonstrates, better than even mere refusal to answer, a conscious perception of the necessity of explanation, and that the truth would injure far more than the intelligent choice of silence.

The presumptions drawn from the refusal of these defendants to throw light upon their transaction is intensified by other facts. By statement made March 21, 1894, of the inventory of December 31, 1893, and by his testimony on the trial, Goldstein averred it to be true that his stock, outstandings and cash at that time amounted to $43,731 and his liabilities $12,600, leaving a surplus of $31,131. Those liabilities, he asserted, consisted of indebtedness for merchandise, $3,600, and loan from the banks, $9,000. He and Neuberger now testify that at this period the whole sum of $12,700 for money borrowed was owing Neuberger, with interest, none of which had been paid. Goldstein either then falsified his inventory as stated to the Commercial Agency, for the purpose of bolstering up false credit, and with a view to the scheme of fraudulent bankruptcy, or he did not in fact owe his father-in-law. One horn of the dilemma he must take. Either one condemns him as to the creditors who thereafter trusted him, lulled into a false sense of security as to his solvency and honor. And his previous financial statements, during the periods when it is asserted these loans were made by the father-in-law, confirm the conclusion drawn from the inventory of December 31, 1893.

Nor is the defendant Neuberger free from inferential acquiescence in the course of conduct of his son-in-law. Up to the exigency of the last moment, when it became necessary to gather in great haste all that creditors could reach, the claims of the father-in-law were passive and his action unusual in an honest creditor. Aside from receipts or notes which may have been made at any time, and which do not afford proof of indebtedness when their substantial basis is challenged, he presents no books of accounts. He says that he had a memorandum book, which he does not produce, and the absence of which he does not satisfactorily account for. He makes his alleged loans partly in checks, not produced,

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and in currency. His withdrawals from the banks on various occasions may well have been used as items of loans, when his books would show they were used for a very different purpose. He demands no interest during the years from January, 1891, to November, 1895, and thereafter figures up compounded interest on the amount of his loans to reach the approximate total to what he says is the net sum realized from the transfer of accounts. He separates the sums received on those accounts from his other banking accounts by depositing in a new banking house, withdraws considerable of those sums for his daughter, the wife of the debtor, and suffers that debtor to use those sums under cover of a power of attorney from the wife. He withdraws other sums for the purchase of real estate taken in the name of Joseph Rosenberg, another son-in-law, and allows the rents to be collected by the debtor Goldstein without payment over or accounting.

Except for the accomplishment of the purpose to take away from the reach of the law all of the property which Goldstein had, the execution of which was initiated on the 4th of November, 1895, and the speedy action necessary to accomplish that purpose, the whole conduct of Neuberger is inconsistent with that of a creditor, acting in a business way, with a continuous purpose of preserving the relations of creditor and debtor between him and the other party; but is entirely consistent with the position of a father-in-law, who may have been very willing to advance some sums to a daughter towards her portion by assisting the husband in business, but without any view of ever pressing that husband to repay the same, or of entering whatever moneys were advanced and were not repaid in his business books as business loans to be collected in the future. The very effort which Neuberger makes upon the trial to show many business transactions between him and Goldstein, by loans made through checks which Neuberger does produce upon the trial, and which he admits were repaid, and which could not be counted in to uphold the transaction of November 4, 1895, because they had placed themselves upon the nine alleged loans of earlier dates beyond recall, demonstrates the essential difference between the transactions which were intended as business affairs, and those which never were so regarded until they could be made use of to absorb all that Goldstein had for the benefit of his wife and himself, his business career under his own name being thenceforth a failure.

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On the nineteenth of February, 1895, to obtain a relief from personal assessment, Neuberger made affidavit that he had no personal property. If he then had a secured claim for upwards of $16,000, afterwards fully realized, that affidavit was untrue. If, in his own conscience, he was aware that he had no legal claim to the moneys arising upon this transfer of accounts, but was simply acting as a shield to benefit those near unto him, that affidavit may have been true. It is more consistent with the version that the moneys, whatever their amounts were, which passed from him to his son-in-law, were not the basis of legal liability against that son-in-law, than the other one that his claim was just in the law, it being in fact well secured.

There are numerous circumstances in the details of the business life of Goldstein for five years before his failure, including the asserted circumstances of the manner of the origin of the claims of Helen Rosenberg and Leo Loeb, and their participating action in the hasty sweeping away of Goldstein's property in November, 1895, which corroborate the presumptions heretofore alluded to. It is unnecessary to review them in this opinion in order to reach the conclusion to which this court has arrived. Transactions between a father-in-law and the husband of his daughter, in which she is deeply concerned, cannot hang suspended, to be turned into advancements or the sharings of a portion of accumulated wealth, or into protecting loans, as occasion may require, and then used to the great detriment of trusting creditors of the son-in-law, who have the right to current knowledge of the financial situation of the latter to a reasonable certainty. Nor was Neuberger more free from assumed participation in the accomplishment of a result in which he lent the necessary aid, nor could he claim a preference begotten out of the fraud perpetrated upon the creditors by Goldstein, who did not select an innocent purchaser to advance money upon a transaction secretly designed by him to defraud, but used his father-in-law under an assumed claim of indebtedness to him, that father-in-law parting with nothing of value in the culminating act, and who preserves unimpaired any rightful claim he may have against the debtor.

I, therefore, hold that, upon the proof in this case, the transfer of the accounts on the fourth of November, 1895, was a fraud upon the creditors of Goldstein, and the subsequent proceedings in bankruptcy cannot affect the equitable lien acquired by the

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commencement of this action long before the passage of the Bankrupt Act. Freedman's Saving & T. Company v. Earle, 110 U. S. 710, 716; Edmeston v. Lyde, 1 Paige, 637; First National Bank v. Shuler, 153 N. Y. 163.

The trustee in bankruptcy took only the residuum which the debtor had on the third day of June, 1899, this action having been begun long before. The judgment debtor could not by proceedings in bankruptcy further his scheme in any manner by destroying the equitable lien obtained by his creditors through the commencement of this action.

Judgment is, therefore, directed that the transfer of accounts be set aside as fraudulent and void; that a receiver be appointed to whom shall be paid the amount received by Neuberger upon the accounts so transferred, with interest from November 4, 1895; or that, at his election, Neuberger pay over to the plaintiffs the full amount of their claim and interest, with the costs of this action, and that the plaintiffs recover of the defendants such costs.

Judgment accordingly.

DUDLY R. HORTON, Plaintiff, *v.* THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant.

(Supreme Court, New York Special Term, July, 1901.)

Misjoinder — Complaint stating only a single wrong — Charge of conspiracy surplusage.

A complaint which, in its first count, alleges an improper ejection of the plaintiff's property from his law office in the building of the defendant and claims therefor treble damages, and which, in its second count, alleges the same acts as done through a conspiracy between the officers of the defendant and a third person, the plaintiff's immediate lessor, and claims therefor general damages, states but one cause of action — for unlawful interference with his property and tenant rights — and therefore is not demurrable as improperly joining two causes of action.

DEMURRER to complaint.

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Sanford S. Gowdey, for plaintiff.

Alexander & Colby (John A. Thompson, of counsel), for defendant.

RUSSELL, J. The demurrant asserts that the complaint is bad for improper joinder of two causes of action. Two counts are set forth in the complaint. The first avers the improper ejection of plaintiff's property from his law office in the Equitable Building, New York city, on the 28th of October, 1894, and injury to such property to plaintiff's damage in the sum of $250, with a claim for treble damages under section 654 of the Penal Code, which punishes willful injury to property by fine and imprisonment, and also gives to the party injured treble damages to be recovered in a civil action.

The second count reaffirms the allegations in the first and avers that the same unlawful act was done through a conspiracy between the officers of the defendant and the lessor of the plaintiff, and also avers a general injury to plaintiff's business in the sum of $5,000.

From all the facts stated in the complaint there arises but one cause of action. That cause of action exists, if at all, in consequence of the unlawful act of the defendant by the interference with his property and tenant rights. But one action could be maintained by him against this defendant for such an injury. If the ejection was wrongful the recovery could be had, but that one recovery satisfies any claim for damages he might have so far as the right to resort to an action for such purpose may be permitted. A judgment based upon the facts stated in the first count would be a bar to the maintenance of the second action upon the statements of the second count. The reason forbidding the joinder of different claims, which overcomes the general rule that it is for the interest of the public to condense a litigation between the same parties into one action, is that no defendant shall be subject to the embarrassment and difficulty of meeting on the trial claims arising from widely different issues, and that the court and jury shall not be perplexed in the solution of the matter at issue between the parties. Where, however, but one cause of action exists, which arises from a single transaction, the plaintiff has in some manner or form the right to present his claim by way of complaint for all

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the results which may by provision of law ensue. He has a right to all the damages resulting from the wrongful act. If he claims damages he must prove them whether he be entitled to treble damages or not. In this respect the rule is different here from that of an ordinary action for a penalty where the proof of the act brings, without evidence of damages, the right to recover the penalty. If the facts alleged to sustain the cause of action entitle the plaintiff to recover treble damages, the court may so rule upon the trial.

It is perhaps difficult to see what the allegation of the conspiracy is inserted for. If the act was a willful wrong, it does not add to the force of the consequences that that wrong may have been plotted with another instead of being the sole creation of the one who executes. A willful act is one which presumes that the thing was done in consequence of deliberate design. If that design had been confined to a mere wish or purpose, or a conspiracy agreed upon with another to accomplish the result, and no overt act was perpetrated to carry out that purpose or conspiracy, no injury came to the plaintiff. Many of the allegations of the complaint are mere statements evidential in their character to justify the averment of the facts stated. Whatever objection might be made to them upon a proper motion, or whatever objection may be made upon the trial to the recovery of treble or punitive damages, is not the question for solution here.

I hold that two different causes of action are not improperly joined in the complaint, and, therefore, overrule the demurrer, with costs, and leave to answer on the payment of costs.

Demurrer overruled, with costs; leave to answer on payment of costs.

BRIDGET CAMPBELL, Plaintiff, *v.* THE NEW YORK & HARLEM R. R. Co. et al., Defendants.

(Supreme Court, New York Special Term, July, 1901.)

New York city — Damages for Park avenue viaduct, Manhattan — User — Disturbance — Practical location.

An abutter, since 1884, on Park avenue, Manhattan, where the Harlem railroad, in 1872–1875, widened its solid viaduct from twenty-four to fifty-nine feet, and, in 1894–1897, by the agency of an in-

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dependent board raised it six feet and made it an elevated structure, using for its traffic during the latter period a temporary structure erected by that board, can recover of the railroad easement damages only for the increased height of the viaduct and only from the beginning of the use of the temporary structure, where neither she, nor any prior owner of the premises, had, before 1897, ever definitely interfered with the user of the railroad, and this although the first owner in her chain of title had conveyed to the railroad, for railroad purposes, only a twenty-four foot strip in the avenue, it appearing that he had previously conveyed the whole avenue, in front of the premises, to the city.

A suit, begun by her in 1891 against the railroad and discontinued, cannot be deemed a disturbance of the user sufficient to break it.

The practical location established by such acquiescence concludes the abutting owner as to damages before the construction of the temporary viaduct, even though the growth of business may have greatly increased the traffic over the viaduct as enlarged and elevated.

ACTION for damages and an injunction.

Bushby & Berkeley, for plaintiff.

Ira A. Place (C. C. Paulding and Thomas Emory, of counsel), for defendants.

RUSSELL, J. The plaintiff brings the usual action for damages and injunction on account of the erection of the viaduct in Park avenue, New York city, and the passage of trains to the number of some five hundred per day, in front of her premises No. 1487, situated between One Hundred and Eighth and One Hundred and Ninth streets, on the easterly side of Park avenue. Her lot is about twenty-seven feet front and seventy-six feet deep. She has thereon a four story brick building used for tenement lettings. The plaintiff claims by sundry mesne conveyances from Benjamin L. Benson who deeded to Harriet M. Wiswall, June 2, 1835, by conveyance recorded June 10, 1835.

She received her title from John Hickey by deed, dated April 1, 1884. No interference by the plaintiff or her predecessors in title with the user by the railroad company has been shown until

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this action, which was begun July 26, 1897, except a suit commenced by the plaintiff in 1891 which was discontinued.

In 1825, Benson conveyed the street to the city, reserving trees, buildings and improvements. In 1832 he conveyed to the Harlem Railroad Company, for railroad purposes, a strip twenty-four feet wide with a right to slope the embankments. This deed was recorded August 18, 1835. In 1848 trains were running on Park avenue, and in 1855 the railroad company used a viaduct between twenty-four and twenty-seven feet wide with slopes, running its cars then as far down as the city hall.

From 1872 to 1875, the viaduct structure was widened to fifty-nine feet. That new structure was so far completed that trains passed over it in the year 1875. In pursuance of the mandatory authority of the United States Government and an act of the Legislature of the State of New York, and under the constructing agency of an independent board, the viaduct was raised over six feet in front of plaintiff's building, changing the stone form of the structure to one of steel, leaving the space under the railroad bed freer to the passage of vehicles and the public than before. The change occupied about three years from 1894 to 1897, the railroad using a temporary structure furnished by the same board which constructed the new viaduct.

During the past ten years the rental values of the plaintiff's premises have diminished to some extent. The principal cause of that diminution, so far as it has been occasioned by the railroad uses, has been the increase of traffic, necessitating a greater number and size of the trains. The difference between the height of the viaduct as it now stands and as it was before 1894, has not severely affected the plaintiff's property, especially when we take into consideration the increased facility of access from the opening of the structure below the bed of the railroad.

I cannot assent to the claim now made by the plaintiff that her right of recovery goes back for six years prior to the commencement of the action on the theory that the defendants never acquired by grant or prescription any right to use more than twenty-four feet space in Park avenue. The application of the doctrine of adverse possession and practical location bears with more or less force according to the situation and user of the easement claimed. It is one thing to establish by location or hostile possession the right to the exclusive use of a lot of land, and a very

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different thing to maintain a limited use of a public street which has always been assented to by the city, and the extended use of which is commanded by law and the action of the city itself. The lines of the user are not drawn with mathematical precision like the boundaries of a tract of land, and, when a street is dedicated partly to the uses of the travelling public, even by conveyances, managed by a private corporation, the number of passengers carried and the number of trains propelled through the street are not definitely fixed, but vary or increase with the necessities for the proper use of the implied grant or acquiescence. This conception of what an easement to carry people through a public street may mean, does not at all extend to the right of materially increasing the size of the obstruction, but simply allows the structure to be used for its fullest capacity so far as the right to maintain that structure has sprung up from direct grant, or grown into full life by the silent assent of those interested in prevention.

In the present case user was acquired by the defendants of the structure as it was prior to 1872, and of the enlarged structure from 1875 to 1897. I cannot hold that the abandoned suit of 1891 is such a disturbance of that user as to justify the claim that the use was broken. The discontinuance is as forceful as the commencement of the action. It was an admission that that action was not maintainable, and such inference cannot be rebutted by the commencement of a later action, for the earlier suit could have brought within its scope the right to damages from 1885 which were waived by the discontinuance. The only proof also of this 1891 action is the affirmative defense in the defendants' answer here, which cannot be entirely correct as to the cause of action being the same, because the new viaduct was not started until 1894. The doctrine of practical location also assists very materially in determining the assent to the user from 1875 on the part of one who purchased in 1884, and who rested quietly until 1891. Practical location does not depend upon the exact number of years, but aids in the inferences of assent, especially in a case where the disturbance was daily, and was not in the nature of any interference with the plaintiff's premises, except in the incidental benefits which may have been deemed wholly compensated for by the more speedy access afforded by the use of the street for railroad purposes, to those premises so far distant from that part of the city devoted especially to business purposes. This doctrine

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of practical location is not the same as adverse possession. Katz v. Kaiser, 154 N. Y. 295; Reed v. Farr, 35 id. 113.

The legal principles applicable to this case have been mainly settled by the Appellate Division of the Supreme Court and the Court of Appeals. The case of Taylor v. N. Y. & Harlem R. R. Co., 27 App. Div. 190, was decided before the case of Lewis v. the same company, 162 N. Y. 203. In the Taylor case it was held that the abutter could not recover damages on account of the original permanent embankment existing before 1894. In the Lewis case the Court of Appeals decided that the railroad company had a right to maintain that viaduct forever within the same limits and at the same height and to the extent of the user, and that the use of the temporary structure from 1894 to 1897 gave a right to damages suffered from the increased height, deducting, however, the benefits from the increased facilities of access. The latter case was followed by the Appellate Division in Fries v. New York & Harlem R. R. Co., 57 App. Div. 577, and in Sander v. same defendant, 58 id. 622.

Limiting, therefore, the recovery for the period beginning with the use of the temporary structure, I award $1,250 for rental damages and $1,500 for fee damages. Let the usual provision be made for an injunction, unless the damages are paid within a stated time. The plaintiff is also entitled to costs.

Ordered accordingly.

JACOB M. MERTENS et al., as Executors and Trustees, Etc., Plaintiffs, *v.* EMMA J. WAKEFIELD et al., Defendants.

(Supreme Court, Onondaga Special Term, July, 1901.)

Mortgage — Reassignment by mortgagor after payment and surrender — Equities — Code C. P., §§ 829, 835.

Where a wife mortgages property given her by her husband, thereafter reconveys it to him by warranty deed upon his promise subsequently executed to will her a life estate in all his property provided she pays the liens upon his real estate, and after paying the bond and mortgage and taking an assignment of them after his death, assigns them and thereafter induces another party to buy them of her assignee, for her advantage, she tacitly representing them as valid,

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the purchaser may enforce them against her life estate, as she has estopped herself; but he cannot enforce them against the heirs or executors of her husband as she has become, as to them, the principal debtor and has paid the debt, a duty in the proper performance of which they have an interest.

An assignee of a mortgage takes it subject not only to all equities of the parties to it, but to equities which third persons could enforce against the assignor.

Testimony of the husband's attorney and executor as to the facts of the transaction between the husband and wife, when she reconveyed to him upon his promise to provide for her by will, is not excluded by Code C. P., § 835, nor by section 829, nor because the plaintiff in foreclosure, the person to whom the wife assigned the mortgage, was not present at the transaction.

ACTION to foreclose a mortgage upon certain real estate situate in the city of Syracuse, N. Y.

G. R. & C. C. Cook, for plaintiffs.

McGregor & McIntyre, for Walter S. McGregor, as executor, etc.

Jenney & Jenney, for defendants Mary C. Titus and others, infants.

ANDREWS, W. S., J. On December 9, 1889, Robert A. Titus was one of the trustees of the estate of Alexander Dissel, deceased. He was also the owner of lot No. 1 in block No. 37 in the city of Syracuse. Upon that day, for the expressed consideration of one dollar, he conveyed the said lot to his wife. Upon the same day, Mr. Titus and his wife gave a bond to the father of the former, Silas Titus, for the sum of $2,500, secured by a mortgage upon the same property. Silas Titus appears to have paid nothing therefor, but he immediately thereafter assigned such bond and mortgage to Alexander Dissel, Jacob M. Mertens, Robert A. Titus and John McCarthy, as executors and trustees of the Dissel estate. The latter gave a check upon the First National Bank of Syracuse for the sum of $2,500 to the order of Emma J. Titus. This check was indorsed by her and handed to her hus-

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band, Robert A. Titus. He took the same to the Trust & Deposit Company of Onondaga and deposited it to his individual credit.

Robert A. Titus died on or about September 17, 1892. At this time he was carrying life insurance to the amount of $15,000, $5,000 of which was payable to his estate and the balance to his wife. On the evening before his death, he requested her to reconvey the property to him, and to apply the life insurance coming to her to the payment of the mortgage liens upon it and other lands. If she would do so, he promised to give her by will, for life, all his real and personal estate. She accepted the proposition; at once reconveyed to him by warranty deed, in consideration, as expressed, of "one dollar and other good and valuable considerations," the lot in question; and he, in turn, executed such a will as he had agreed.

On February 25, 1893, Mrs. Titus, now remarried and known as Mrs. Wakefield, paid to Mr. Mertens, one of the trustees of the Dissel estate, out of the insurance moneys which she had then received, $6,000. This sum included the entire amount that was due upon the mortgage, and also a certain amount upon other indebtedness. Upon receiving the payment, Mr. Mertens gave to Mrs. Titus a receipt, stating that he had received $6,000 to apply on bond and mortgage to Alexander Dissel and others, as trustees; and also delivered to her an assignment of this same bond and mortgage.

This bond and mortgage Mrs. Titus held until April 4, 1894, when she assigned the same to Nathan Jacobson. A few days later she came to Mr. Mertens and told him that the Dissel estate held other mortgages upon which the Titus estate was liable; said that she desired to have all of these mortgages held by one person, and asked him to buy the bond and mortgage of Dr. Jacobson. Mr. Mertens finally consented, gave her the amount due thereon and she thereupon delivered that amount to Dr. Jacobson, and obtained from him an assignment of the securities to the Dissel estate.

It is this mortgage, so held, which it is now sought to foreclose.

Mr. McGregor, as one of the executors of the estate of Robert A. Titus, appears and answers, alleging that the payment made by Mrs. Titus to the trustees of the Dissel estate on the 25th day of February, 1893, satisfied and extinguished the mortgage in question, and that it had thereafter no force and effect.

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The four minor children of Mr. Titus also appear by Alexander Jenney, as their special guardian, and submit their rights to the court.

The proposition that where a mortgage executed to secure a specific debt is once paid, it is dead for all purposes, and cannot be revived to secure a new obligation as against those whose rights have intervened, is too well settled to require the citation of authorities.

It is also equally well settled that while, on the one hand, a written document purporting to be a discharge of a mortgage may, under some circumstances, have the effect of an assignment, so, on the other, a conveyance in the form of an assignment may operate as a satisfaction. This is a matter in which the form of the conveyance is not a decisive test, and a court of equity will go behind the form to reach the substantial merits of the case. Ryer v. Gass, 130 Mass. 227.

Whether, as is said by Chief Justice Shaw, a given transaction shall be held, in legal effect, to operate as a payment and discharge, which extinguishes the mortgage, or as an assignment, which preserves and keeps it on foot, does not so much depend upon the form of words used, as upon the relations subsisting between the parties advancing the money, and the party executing the transfer or release, and their relative duties. Brown v. Lapham, 3 Cush. 551.

The general principle cannot be better stated than in the words used by the chief justice in the case last cited: "If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage, and relieve the mortgaged premises of the lien, a duty in the proper performance of which others have an interest, it shall be held to be a release, and not an assignment; although in form it purports to be an assignment.

"When no such controlling obligation or duty exists, such an assignment shall be held to constitute an extinguishment or an assignment, according to the intent of the parties; and their respective interests in the subject will have a strong bearing upon the question of such intent."

Illustrations of these rules are found in many cases. If, for instance, a grantee who has taken lands expressly subject to a mortgage which he covenants to pay, does pay the amount due and then takes an assignment to himself, the mortgage will be

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deemed paid as regards those who have an interest in the performance of such duty.

It was so held in Carlton v. Jackson, 121 Mass. 592, where it was said that "the rule applies, that when the money is paid by one whose duty it is by contract, or otherwise, to pay the mortgage, it is a release, though in form it purports to be an assignment." Such was the case of Burnham v. Dorr, 72 Maine, 198, where the language of Judge Shaw was quoted with approval. Such also was the case of Clay v. Banks, 71 Ga. 363, where the same language is again quoted and approved. The same rule had been enforced in the courts of this State.

In Ely v. McNight, 30 How. Pr. 97, the head-note states that "Where a mortgagor conveys the premises mortgaged to a purchaser, under an agreement that the latter shall pay the mortgage as a part of the consideration for the premises purchased, and instead of paying the mortgage the purchaser takes an assignment of it, with the accompanying bond, to himself, and subsequently assigns the same to a third person, who sues the mortgagor upon the bond, the action cannot be sustained. As between the mortgagor and the purchaser, the agreement operates to discharge the mortgage debt." And the same rule is laid down in Kellogg v. Ames, 41 Barb. 218.

A similar illustration is found in the doctrine that a grantor who covenants against incumbrances, and who subsequently pays off the mortgage existing at the time of the conveyance, cannot, by taking an assignment to himself, keep the security alive. Wadsworth v. Williams, 100 Mass. 126; Stoddard v. Rotton, 5 Bosw. 378; Mickles v. Dillaye, 15 Hun, 296; Mickles v. Townsend, 18 N. Y. 575.

So a person who, with the funds of a mortgagor, and, as his agent, pays a mortgage, cannot enforce the security even if he has it assigned to himself. The assignment will be treated as a satisfaction. Shepherd's Ex'x v. McClain, 18 N. J. Eq. 128.

Illustrations of the exception suggested by Judge Shaw to the first portion of the rule above quoted, that it applies only when others have an interest in its application, may be found in certain New York cases. As is said by Judge Rapallo in Hubbell v. Blakeslee, 71 N. Y. 63, even in case the creditor makes the payment out of his own means, yet "if at the time of the payment it was agreed that the mortgage should not be extinguished, but

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should be kept alive and be transferred to another creditor of the mortgagor, and payment was made and received on that condition, the agreement would have been valid, * * * and such a payment would not extinguish the mortgage, and the creditor to whom the mortgage was assigned, in pursuance of such an arrangement, could enforce it. No one is injured by such a transaction. The debtor could make the payment for account of the creditor to whom he desired the mortgage assigned, and the creditor could ratify the transaction by accepting the assignment. The result is the same as if the creditor had himself purchased the mortgage with means furnished by his debtor."

"No one is injured by such a transaction." In that phrase is the key to such cases as Hubbell v. Blakeslee. The mortgagor has the right to pay any creditor. A creditor so paid has the right to use the money received in the purchase of a mortgage upon the property of his debtor. This, in effect, is what has been done, and of such acts no one can complain.

Illustrations of the second branch of the rule, namely, that where no duty exists to pay a mortgage an assignment shall be held to constitute an extinguishment or assignment according to the intent of the parties, are also numerous. One will be found in Ryer v. Gass, 130 Mass. 227, cited above. Another is Huntley v. ReVoir, 66 Hun, 291, where Judge Martin, in summing up the case, says: "Assuming, as we must, the principle established by the cases cited, it follows that Huntley was in no way bound to pay the mortgage debt in exoneration of the land which was the primary fund for its payment, and, therefore, the defendant ReVoir, as judgment creditor, had no right to insist that the payment was in satisfaction of the mortgage, when it clearly appeared that it was not the intention of the parties to that transaction. It is only where the person paying the mortgage debt is the principal and primary debtor, and is liable personally and primarily for the debt secured, that he cannot prevent the incumbrance from merging where an assignment is taken to a third person for his benefit."

Another well-established rule is of importance in the case at bar. An assignee of a mortgage takes it not only subject to all the equities existing between the parties to the instrument, but to the equities which third persons could enforce against the assignor. Greene v. Warnick, 64 N. Y. 220; Ely v. McNight, 30 How.

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Pr. 97; Kellogg v. Ames, 41 Barb. 218; Cutts v. Guild, 57 N. Y. 229.

Therefore, whether in this case Mr. Mertens purchased the mortgage in question in good faith or bad faith; whether he paid consideration for it, or paid no consideration, is immaterial. He takes it subject not only to the equities existing between the parties to the instrument, but to any equities which may exist in favor of the heirs of Robert A. Titus, or in favor of his executors, against the assignor. If Mrs. Titus could not enforce it against them, he cannot. Nor can he take advantage here, so far as these heirs and executors are concerned, of any false representations or statements which she may have made.

So far as she herself is concerned, the rule is not the same. Independently of all other questions, if she has any interest in the land, the mortgage may be foreclosed to the extent of that interest. She, having assigned it, having tacitly represented that it was a valid and subsisting instrument, is estopped from insisting that it has been paid. Kellogg v. Ames, 41 N. Y. 259; Powell v. Smith, 30 Mich. 451.

But as to the heirs of Robert A. Titus, whose property the land is, subject to the life estate of their mother, and as to his executors, against whom a judgment for deficiency is asked, I must hold that the mortgage is paid. In every way, the duty to make this payment was imposed upon Mrs. Titus. She was, in the first place, one of the original obligors. It may be, as is insisted by the plaintiffs, that, as between her husband and herself, she was really a surety, and that equitably he, having received the proceeds, should pay the indebtedness. It would be difficult to sustain such a finding in view of the fact that the real estate itself was conveyed to her apparently for a nominal consideration, and that a portion, at least, of the $2,500 seems to have been spent on its improvement. But assuming, for the purposes of the argument, that it be so, still this relationship of principal and surety certainly ceased when she agreed with her husband, in consideration of his making a will in her favor, to deed the property back to him, and to pay out of insurance moneys coming to her the incumbrances upon it. It just as certainly ceased when she conveyed the property to him in pursuance of this arrangement, by a warranty deed. By reason of these transactions, if not before, she became liable, in the first instance, to pay this indebtedness.

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It was her duty to do so, and her husband, his heirs and executors, became interested in the performance by her of such duty. Under these circumstances, in view of the authorities which have been cited, she clearly could not take an assignment of this bond and mortgage and preserve them as subsisting securities against her husband's estate. Although she did so in form, the law holds the form of the transaction to be immaterial. It must be assumed that she did what she should have done. She paid the debt; the mortgage ceased to exist, and, as against the other parties whose rights had intervened, she could not resuscitate it.

The facts as to the transaction between her husband and herself depend upon the evidence of Mr. McGregor, who was executor of her husband's estate, and was also his attorney. Under the circumstances disclosed, his evidence was not incompetent under section 835 of the Code of Civil Procedure. Hebbard v. Haughian, 70 N. Y. 54; Britton v. Lorenz, 45 id. 51; Brennan v. Hall, 131 id. 160; Hurlburt v. Hurlburt, 128 id. 420.

Nor does he testify in his own behalf and interest in such a sense that his evidence is incompetent under section 829 of the Code of Civil Procedure. Matter of Gagin's Will, 20 N. Y. Supp. 426; 21 id. 350; Martin v. Hillen, 142 N. Y. 140.

Nor was his evidence incompetent for the reason that it was in regard to the transaction which took place between Mr. and Mrs. Titus in the absence of the plaintiff. It was competent as tending to show the relations between the husband and wife, and the fact that, as between them, the obligation to pay the mortgage rested upon the latter.

I am, therefore, of the opinion that, as against the heirs and executors of Mr. Titus, this action must fail, but that the foreclosure may proceed in so far as it affects the life estate of Mrs. Titus and the judgment demanded against her.

Findings may be prepared in accordance with these views and, upon the settlement of such findings, the question of costs will be considered.

Ordered accordingly.

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ALFRED P. ROTH et al., Plaintiffs, v. THE AMERICAN PIANO MANUFACTURING COMPANY, Defendant.

(Supreme Court, St. Lawrence Special Term, July, 1901.)

Attachment — Affidavit as to a sum certain being due — Subordinate causes of action may be joined with the main one.

The rule that in order to procure an attachment the plaintiffs must prove by affidavit that they are entitled to recover a sum certain, over and above all counterclaims known to them, should not be so strictly held as to defeat the remedy, and an attachment may be allowed to stand for an amount reasonably justified by the papers upon which it was granted.

The court held, however, that a separate cause of action stated as for the defendant vendee's breach of an agreement to take, during the first year of contract relations, 600 harmonists at $110 each and taking only 260, causing an alleged loss of profit of about $1,000, and for the vendee's refusal to surrender instruments, orders, plates, lithographs, accounts and contract rights, to the value of $9,500, notwithstanding the vendors had, as alleged, a right to and had cancelled the contract for the vendee's non-compliance with it, did not show that the vendors were entitled to recover any sum certain upon that cause of action.

The plaintiffs may properly unite, in one action in which an attachment is sought, all their claims against the defendant under one contract and also those under any other subordinate and incidental contract.

MOTION to vacate an attachment.

A. M. Mills, for plaintiffs.

Elek John Ludvigh, for defendant.

RUSSELL, J. The defendant moves to vacate the attachment, commanding the sheriff of any county to satisfy the plaintiffs' demand of $18,365.89, with costs and expenses, upon the ground that the papers upon which the attachment was granted were in-

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sufficient. The complaint and affidavit for the attachment base the claim of the plaintiffs upon four causes of action, the first of which declares for goods sold and delivered, and a balance due over and above all credits, claims, offsets and counterclaims, of $6,086.29; the second, for making and furnishing stencils and music rolls to the value of $2,220, which the defendant agreed to pay; the third, for breach of an agreement to take during the first year of contract relations, six hundred harmonists, at $110 each, and only taking 260 during the period, thereby causing a loss of profit of about $1,000, and for refusing to surrender to the plaintiffs, instruments, orders, plates, lithographs, accounts and contract rights to the value of $9,500, notwithstanding the right of cancellation was reserved to the plaintiffs upon noncompliance by defendant with the terms of the contract, which right of cancellation had been exercised; and for a fourth cause of action for piano actions, sold and delivered by plaintiffs to defendant at the agreed price of $559.60.

The objection made is that, neither by any of the causes of action, singly, nor by the union of all stated together, does it appear that a certain sum is due and owing from the defendant to the plaintiffs. As to the first, second and fourth causes of action the objection is not tenable. The writ of attachment is a substantial right designed to give to honest claimants, as against nonresidents or fraudulent debtors, security to render a judgment available which might otherwise be lost but for a preliminary levy upon such property as may be found. For any breach of contract except a promise to marry, wrongful conversion of personalty, for negligent, fraudulent or other wrongful act causing injury to person or property, this remedy is afforded. (Code of Civil Procedure, § 635.) To confine the remedy to claims, exact in their amount, would nullify the provisions of the Code, and in many cases greatly limit the beneficial character of the writ. In an action for goods sold and delivered upon a just claim, the affiant might be unable to truthfully aver any liquidation or stating of the account, and be compelled to rely upon an averment of value. In an action for wrongful conversion of personal property, it would be impossible, as against a defendant refusing to admit any liability, to make the amount of the claim exact or certain save as estimates of valuation might indicate the approximate amount of damages.

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A statement of the difference between the price at which salmon were purchased and the price for which plaintiffs resold the same, is sufficient to sustain an attachment, although the court was not of the opinion that such was the certain measure of damages, leaving, therefore, the precise loss unsolved upon the face of the papers. Delafield v. Armsby Co., 58 App. Div. 432.

And in this case in the dissenting opinion of Presiding Justice Van Brunt, it is inferentially stated, that, if the correct measure of damages, which was the difference between the price agreed for the purchase and the value of the article when it should have been delivered which, of course, was a matter of estimate, had been stated in the affidavit, the attachment might have been sustained.

The true reason why courts are chary of seizing property upon a claim not established by judgment upon unliquidated demands is the danger, by the oppressive use of the writ of attachment, of securing sums stated far beyond the amounts which are ascertained afterwards upon the trial to be the limit of the actual indebtedness. But this danger may be avoided by the exercise of wise discretion; and a middle course, which is generally the one of safety, may be followed without impairing the useful power of the writ, and without oppression to the defendant. The court has always the inherent power to prevent its processes being used for improper purposes, and that power can always be exercised when an application to grant, modify or vacate any of its writs is made by a suitor coming within its jurisdiction. The original writ of attachment is not to be granted as a matter of course, even where apparent grounds to justify its issuance are stated in the papers formally presented to the court. The writ is discretionary, as also the application to modify or vacate. Haebler v. Bernharth, 115 N. Y. 459, 463.

I see no reason, therefore, to prevent the exercise by this court of its power to retain the writ of attachment for an amount reasonably justified by the papers on which it was granted, and to modify its force by a reduction of the plaintiffs' demand to such limits as may fairly be sustained. The statute itself seems to contemplate such a use of discretion, even upon the original application. It provides that the sheriff must attach sufficient to satisfy the amount of the plaintiffs' demand, with costs and expenses. (Code Civ. Pro., § 640.) That does not mean the amount of the demand in the complaint but the amount of the demand sufficiently

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proven to the satisfaction of the judge. (§ 636.) It was a very proper thing for the plaintiffs to unite in one action all their claims against the defendant upon the single contract and any other contract subordinate or incidental to the main agreement in order to avoid unnecessary litigation, and any determination of the court upon an application for an attachment will not impair their right to recover all they may satisfactorily establish upon the trial. But the defendant must not be burdened in advance with the deprivation of his property upon any portion of the claims, about which there is just cause for doubt as to the right of recovery for an amount which can be approximated with reasonable certainty upon the papers presented for the attachment. Nor should the plaintiffs be punished for confining the litigation to one action instead of beginning several.

I do not think the damages, as stated in the papers for the attachment upon the third cause of action, sufficiently ascertainable, with a reasonable certainty, so that I am justified in upholding the attachment as to that cause of action. As to the others I hold otherwise. The averments unexplained and uncontradicted by the defendant justify the right of recovery for the sums named in the statement of those causes of action.

The cases cited by counsel for the defendant do not militate against this view. In Thorington v. Merrick, 101 N. Y. 5, the Court of Appeals simply hold that the action was an equitable one, and that the papers show that the plaintiffs were only entitled to a judgment decreeing that certain pine lands were held in trust for the plaintiffs and for an accounting.

In the Union Con. M. Company v. Raht, 9 Hun, 208, the General Term of the First Department decided that, if the plaintiff chose to insert a cause of action which would not allow an attachment with another which did, such election on his part prevented the issuance of a writ. It is plain that in such a case the recovery might be for a cause of action upon which no attachment could have been issued, and yet the execution would find the property unjustly held, so that the practical result would be the satisfaction of that judgment through the process of attachment upon a claim for which an attachment would not lie.

Here no such result can follow. If the plaintiffs had stated with sufficient precision to demonstrate to a reasonable certainty the approximate amount of their damages under the third cause

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of action, an attachment would lie, and, as all of their claims are drawn from the relations of the parties under one contract, no substantial injustice can be worked by its enforcement for causes of action stated on that contract in case the plaintiffs ultimately recover at all.

The motion, therefore, is denied, but the amount of the plaintiffs' demand is limited to the sums stated in the first, second and fourth causes of action, and the attachment is modified accordingly.

Ordered accordingly.

THE VILLAGE OF MECHANICVILLE, Plaintiff, *v*, THE STILLWATER AND MECHANICVILLE STREET RAILWAY COMPANY, Defendant.

(Supreme Court, St. Lawrence Special Term, July, 1901.)

Village street railway corporation — Its duty to pave in and outside of its permanent way — L. 1892, ch. 676, § 98; 1901, ch. 494, § 1.

A franchise or contract, given in 1882 and renewed in 1894, by a village to a street railway corporation, now operated by electricity, contained the requirement that the space between the rails and for twenty inches outside of them, on both sides of the track, should be paved by the railway corporation with "small stone" and "that the same should at all times be kept in good condition." In 1899 the village required of the railway corporation a six inch excavation filled in with sand or gravel and covered with vitrified paving brick. The railway corporation refused to pave and the village, at its own expense, did the work it had required.

Held, that the village could recover the expense of the railway corporation, as the village had a right to exact what it deemed a pavement suitable in 1899, and was not limited to requiring a pavement composed of "small stone."

That the contracts or franchises granted by the village trustees, persons having limited powers, were not a defense, as the trustees could not give up the streets to private corporations nor surrender the right of the public to have the streets in proper condition for use

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That the act (L. 1892, ch. 676, § 98), requiring a street surface railway corporation to keep its street way in repair as and when directed by the local authorities, did not impair the obligation of contracts, and that the act (L. 1901, ch. 494, § 1), ratifying pre-existing contracts between street railway corporations and villages, constituted no defense.

ACTION to recover the cost of repaving the streets in said village of Mechanicville, contiguous to defendant's tracks, made necessary by the maintenance and operation of defendant's railway.

D. A. Lockwood, for plaintiff.

Thomas O'Connor, for defendant.

RUSSELL, J. The plaintiff seeks to recover the cost of repaving the streets in the village of Mechanicville, contiguous to the defendant's tracks, made necessary by the maintenance and operation of the defendant's railway. The defendant objects on the ground of non-liability, because the notice to repair was informal, and did not specify the kind of bricks or blocks desired, and required the work to be done under the supervision of the village engineer. The defendant also claims that a contract was made and a franchise given, specifying the kind of paving to consist of small stone between the rails and twenty inches outside, which could not be altered by the Legislature or by the requirement of the situation, and that chapter 494 of the Laws of 1901 (§ 1) ratifies pre-existing contracts with street railway companies in cities of the third class, towns or villages.

Two franchises were given to the defendant and contracts made by it with the village in pursuance of the resolution of the trustees. The first was November 20, 1882, which provided as follows:

"*Fifth.* The space between the rails and the space of at least twenty inches wide outside the said rails on both sides of the track shall be paved with small stone and the same shall at all times be kept in good condition."

November 26, 1894, a similar franchise was given, embracing a like clause to the one quoted. On the 29th of August, 1899, a

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notice was served by the village requiring a six-inch excavation filled in with sand or gravel and covered with vitrified paving brick. The Railway Company declined to conform to the notice and did not attempt to do the paving even in its own way, so that the village was compelled to do the work at its own expense. No previous controversy seems to have arisen between the parties, but it may be fairly assumed, if the village authorities had any right to require suitable pavement, they had the power to take into consideration all of the factors necessary to the exigencies then existing for the service of the public, the needs of a growing community for the proper passage along the public streets, and the care required to allow vehicles a smooth way and proper ability to avoid cars propelled by electric power in these days, when street railway cars are no longer moved by the lingering horse.

It is also well to remember that no village trustees, who have limited powers, can withdraw from the public the use of the streets to give them up to private corporations. Such powers are held in trust for the public benefit and cannot be abrogated or delegated to private parties. Milhau v. Sharp, 27 N. Y. 611; approved, Story v. New York Elevated R. R. Co., 90 id. 158, 161.

It is also well to bear in mind what was the situation and what the rights of the parties had there been no provision in regard to pavement or keeping the streets in good condition. Here was a railway company asking, for its own private emolument, the right to pass along the streets dedicated to the use of the public. It was seeking a privilege which could be of no service to the village except as it conveyed passengers for compensation. Its use of that street would necessarily be limited to the least possible disturbance of the public uses. If it tore up any portion, the obligation of restoration lay upon it. If any part got out of repair within the fair limits of its own uses, and because of its interference with the ordinary public service, the proper repairs should be made by the privileged and exceptional user.

The parties, therefore, gave or received a franchise or contract, the name of which is immaterial, under the recognized situation and obligation as then apparent. They confirm such obligation by the provision that the space the railroad used should be then paved with small stone, but also added "that the same should at all times be kept paved and in good condition." This con-

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struction is recognized by the Legislature in its revision of the Railroad Law (Laws of 1892, chap. 676, § 98). It is there declared to be a duty to the public on the part of the railway company to keep the street way in permanent repair between the tracks and two feet outside under the supervision of the proper local authorities, whenever required by them to do so, and in such manner as they prescribe. Provision is also made for the method of enforcement. This act is proper and forceful. Conway v. City of Rochester, 157 N. Y. 33; People ex rel. Russell v. City of Utica, 45 App. Div. 356.

The case of Gilmore v. City of Utica, 121 N. Y. 561, cited by the defendant's counsel, does not conflict with these assumptions. The Court of Appeals there recognized the power of the common council to act under the right conferred upon them by the Legislature, but held that, if the common council chose to not exercise their discretion, taxpayers who were assessed for improvement could not complain in order to relieve themselves.

Nor does the case of the City of Binghamton v. Binghamton, etc., R. Co., 61 Hun, 479, if of authority, furnish a precedent to overthrow the power of the common council or village trustees to provide suitable pavement. In that case, the evidence showed the street to have had no paving at all at the time the contract was made, and the General Term of the Fourth Department decided that the transition from a dirt road to concrete pavement was too much in the nature of a burden to be justified.

The condition of the franchise here provided for pavement and adopted for the then present small stone as suitable to the situation. It would be a dangerous conclusion to reach to hold, as asked by the defendant's counsel, that this provision gave the railway company the right to pave the streets with small stone for all future generations, whatever the emergency which excited other requirements, in the exercise of the judicial discretion confided to the trustees acting in the interest of the public. Such a principle would also determine that, even if the village trustees waived the obligation of the railway company, that company could prevent by law the interruption of its business through the digging up of the street and putting in another pavement suitable to the conditions necessary, even though done at the expense of the village.

But the remainder of the condition agreed to provided that the space referred to should at all times be kept paved in such man-

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ner as made a good condition. It may very easily be presumed, from the lapse of seventeen years, such a condition of pavement required other than small stone, and that neither of the parties expected or intended that the particular kind of material then to be used, with horse cars running and, perhaps, a small amount of business transacted in the village, was preserved by choice then made and operative forever.

Would the street railway company maintain a different position if it found the use of small stone derogatory to its capacity to conveniently receive passengers and propel its cars by electric power?

The right of our Legislature, preserved by the Constitution, to regulate the reasonable use of corporate privileges, does not violate the provision of the Federal Constitution forbidding the impairment of the obligation of contracts. Every corporation takes its right even to exist subject to this power of the Legislature, and certainly do those who ask for and receive from the Legislature the privilege of limited responsibility, and the right to take property against the will of the owner, within the shield of corporate action. And certainly the act of 1901 in reaffirming contracts does not add to the advantages of the corporation by giving to it more than does the contract itself, and the implied understanding upon which it was based originally conferred.

Judgment is directed for the plaintiff for $1,209, and interest from December 1, 1899, besides costs.

Judgment for plaintiff, with costs.

DAVID J. HANNA, Suing for Himself, as Stockholder, and Others Similarly Situated, Plaintiff, *v.* THE PEOPLE'S NATIONAL BANK OF SALEM et al, Defendants.

(Supreme Court, Saratoga Special Term, July, 1901.)

National bank — Remedy of stockholder sold out for an assessment made necessary by the misconduct of directors — Duty of directors — Statute of Limitations.

A former stockholder in a national bank, presently solvent, whose stock has been sold out by the bank for his failure to pay an assessment thereon made necessary by the negligence or misconduct of its

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directors in loaning its funds to irresponsible parties, may maintain, for himself and all others similarly situated, an equitable action against the bank, and the directors who permitted or caused its loss, to make the directors account to and pay him the value of his stock, as it stood before the acts of negligence or misconduct.

While ordinarily the action should be brought by the corporation against the delinquent directors, this need not be when the managing directors are the ones charged with misconduct.

The directors of such a bank must exercise a reasonable supervision, but where they appoint from their number a discount committee and an examining committee, they shift the responsibility to the members of such committees; and when during three years such committees permit the cashier of the bank to discount notes, for a mere dealer in cheap musical instruments, taken by him from purchasers not known or shown to be responsible, and which notes are frequently protested or renewed, to such an extent that his discounts finally cover two-thirds of the bank's capital, a condition of negligence or misconduct upon the part of the members of the committees is presented which makes them liable to stockholders injured thereby.

The Statute of Limitations applicable to such action is ten, and not three, years.

ACTION by plaintiff, in his own behalf, and in behalf of all others similarly situated, to recover from the directors of the bank for the loss of the value of his stock, which he claims was occasioned by the negligence and misconduct of the directors in loaning the funds of the bank to irresponsible parties.

Lansing & Holmes, for plaintiff.

J. S. Potter, S. W. Russell, and Abner Robertson, for defendants.

HOUGHTON, J. The plaintiff was a stockholder prior to 1893 in the defendant bank. The bank was organized in 1884, and by December, 1893, had sustained such losses that an assessment was made upon the stockholders for the full amount of their stock, in order to enable the bank to continue business. The capital stock of the bank was $50,000, and prior to the fall and summer of

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1893 had apparently been doing a prosperous business for a bank of its character. On the first of January, 1893, it had an apparent surplus on hand of $5,100.

By proper petition and order, stockholders James Donaldson, to whom stock was issued December 27, 1893; Cora M. Arnott, administratrix, etc., of William B. Maynard, deceased, to whom stock was issued July 25, 1892; Frank H. Vail, administrator, etc., of Platt G. Vail, deceased, to whom stock was issued December 4, 1893, and Clarrissa Piser, to whom stock was issued May 20, 1887, have made themselves parties to the action.

The plaintiff, Donaldson and Arnott refused to pay the assessment, and their respective stocks were sold in 1894 to satisfy the same. Vail and Piser paid their assessments, and still hold their stock.

The action is brought by the plaintiff in his own behalf, and in behalf of all others similarly situated, to recover from the directors of the bank for the loss of the value of his stock, which he claims was occasioned by the negligence and misconduct of the directors in loaning, or allowing to be loaned, funds of the bank to irresponsible parties, which brought about the necessity for assessment and sale of his stock. He joins the bank with the directors. The form of the action is in equity, and an accounting is asked if liability shall be determined.

The bank and the various defendants insist that the plaintiff is not in position to bring this action, because he has ceased to be a stockholder, and further claim that, because the corporation itself has not been requested to bring the action, even if the plaintiff were a stockholder, he would have no standing.

The fact that the bank is now under the control of the directors, whose acts and management are questioned, permits the plaintiff to bring an action if he still retains sufficient character as stockholder to do so, for under those circumstances a stockholder has the right to bring such an action without a refusal on the part of the corporation to sue, because it is fair to assume that the delinquent directors would not permit a faithful prosecution of themselves. Robinson v. Smith, 3 Paige, 222; Bloom v. National United Benefit Savings Co., 81 Hun, 123; affd. in 152 N. Y. 114; Brinckerhoff v. Bostwick, 99 id. 185.

Whether or not the plaintiff still occupies such a technical position of stockholder as enables him to bring an action in that ca-

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pacity, there is some doubt. If, however, he lost his stock, as he alleges, through the negligent acts and mismanagement of the defendants, he must have some rights, and there must be some way in which he can enforce them. A receiver of the bank could not be appointed for the purpose of bringing such an action, because the bank is now solvent. The bank itself could not bring such an action against its directors, because its directors, which would set it in motion, are the ones charged with misconduct.

It is stated by the court, in Bloom v. National United Savings Benefit Co., 152 N. Y. 121, that in actions of this character the liability is not in equity, but at law. In any event all of the facts which the plaintiff claims brought about the loss of his stock are stated in the complaint, and some of the plaintiffs are still stockholders, and I think it is proper to determine the questions upon the merits.

One Robert M. Stevenson was the cashier of the defendant bank, during the period complained of, and was elected such at the organization of the bank.

The principal misconduct complained of on the part of the directors is the discounting of paper for one Benjamin G. Long, a dealer in musical instruments. Long resided in the city of Rutland, Vt., and sold musical instruments, principally organs, of a cheap kind, throughout southern Vermont and Washington county. Long's dealings with the bank began a little prior to 1890. He took notes from customers, discounted them at the bank, and paid them largely with renewals or new notes. From 1890 this character of paper was allowed to increase. In 1892 the bank held between $20,000 and $25,000 of paper of this character, and in 1893, on the failure of the bank, there was charged off to profit and loss $32,609.84, represented by nearly 200 notes, ranging from $50 to $250 in amount. Many of the makers could never be found. In subsequent years, occasionally a note was collected or a part of others paid, so that the ultimate loss to the bank from this source was $22,968.05. Long had no visible property to any amount and no store of any pretensions, occupying only a part of a store on one of the business streets of Rutland. No special attempt seems to have been made by any one connected with the bank to find whether the purchasers of the organs were responsible parties or not, and liable to pay their notes. All that seems to have been necessary to enable Long to get the money from the bank was

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to sell an organ to some one, and take his or her note and send it to the bank and it was promptly discounted. If it was not paid, it was renewed, and frequently when it was paid it was paid by another note instead of cash. Checks were frequently protested, and the notes were frequently protested. They were all discounted for Long's benefit, and, when the crash came in 1893, he was a virtual debtor of the bank to an amount equal to two-thirds the capital of the institution.

The by-laws of the bank provided that the directors should meet weekly, but they only met twice a year. There was a committee, called the discount committee, consisting of the president and three directors and the cashier, and their duties were to discount and purchase bills, notes and other evidences of debt, to buy and sell bills of exchange, and report to the directors the bills and evidences of debt held by the bank, at the weekly meetings of the directors. There was another committee, appointed by the board of directors, known as the examining committee, consisting of three members of the board, who counted the cash, compared the assets and liabilities, as shown upon the books, and whose duty it was to report every three months the condition of the bank, and recommend to the board such changes in the manner of doing business as was thought desirable.

In January, 1889, there were elected seventeen directors, and defendant Charles Lyon was thereafter elected president. The discount committee for the year 1891 was Charles Lyon, T. C. Gregory, William C. Larmon and Franklin Stevens. The discount committee for the year 1892 was the same. The discount committee for the year 1893 was Lyon, Larmon, William H. Cotton and W. W. Cleveland. Stevens, Gregory and Cleveland are not made parties to this action. Defendants Rogers and McNaughton were members of the examining committee from 1890 to the failure. The defendant Warren Kenyon was simply a member of the general board of directors.

The directors of a corporation are bound to exercise care and prudence in the execution of their trust to the same degree that men of common prudence ordinarily exercise in their own affairs. Hun v. Cary, 82 N. Y. 65; Warner v. Penoyer, 91 Fed. Rep. 587. The ordinary care which the directors of a national bank must exercise includes something more than officiating as figureheads, and they are not absolved from the duty of reasonable supervis-

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ion, nor shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention. Briggs v. Spaulding, 141 U. S. 133.

Members of a committee appointed for the special purpose of examining the affairs of the bank, or looking after the discounts, have a more active duty to perform than the general board of directors, and they are liable for losses resulting from the mismanagement of the cashier, which could have been ascertained by reasonable diligence. Warner v. Penoyer, 91 Fed. Rep. 587.

The last case above cited was a reversal of the determination of the trial court with respect to the liability of members of the discount and examining committee, and affirmed the decision of the trial court as to non-liability of the general board of directors. The principle there enunciated, with respect to the duties of directors, is no stronger, and is in accordance with the principles enunciated in the opinion in Hun v. Cary, *supra.*

In some respects, the facts in Warner v. Penoyer, *supra,* are similar to those in the case at bar; for there, as here, the directors were farmers, having little experience in banking affairs, and trusted largely to their cashier. But, notwithstanding that, the court held that the members of the discount and examining committee were not excused from exercising ordinary care and prudence in the supervision of the acts of the cashier himself.

I think it cannot be said that the defendants, who were members of either committee, exercised the prudence which men commonly exercise in their own affairs, in allowing a man like Long, a traveling organ peddler, to obtain a discount of over $30,000 upon notes of purchasers of his wares, unknown, or not known to be responsible. No man of any ordinary prudence would loan his own money in this manner. Notes of this character had been continually in the bank for years. It was not as though the cashier had made a large imprudent loan; but here were continuous loans of the same character, and large in number, and small in amount. Any ordinary care and the most common prudence would have put a stop to such extraordinary banking on the part of the cashier. A hundred, or a hundred and fifty, or two hundred Long notes might well have made a bundle large enough to attract the dullest observation and excite the fears of the most phlegmatic financier.

The loss upon the other loans complained of, I do not think

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any of the defendants are liable for. The purchase of securities of the Northwestern Guaranty Loan Company was not an unusual one at the time of the transaction.

The statute of limitation applicable is not three years, but ten years, and that plea of the defendants is ineffectual. Brinckerhoff v. Bostwick, 99 N. Y. 185.

The stock of the plaintiff James Donaldson was not issued to him until December 27, 1893, after all the acts that any one is claimed to be liable for had been done. The same is true of the stock of Vail, which was issued to him December 4, 1893. Neither of them is entitled to the relief asked for, because they were puchasers of their stock after all the damage to it had been done, and it was worthless. With respect to the stock of the others, it was proved that it was worth par certainly at the beginning of the acts complained of.

The defendant Kenyon was not a member of either the discount or examining committee, and as to him the complaint is dismissed.

The plaintiffs Hanna, Arnott and Piser each owned ten shares, and each can recover from the defendants, other than the bank and Kenyon, one-fiftieth of the $22,968.05 lost by the discounts to Long, with costs.

Decision and judgment may be prepared accordingly.

Judgment accordingly.

ALANSON A. SUMNER, Plaintiff, *v.* THE CITY OF GLOVERSVILLE, Defendant.

(Supreme Court, Saratoga Special Term, July, 1901.)

Watercourse — Lower riparian owner must show that a diversion of water above is material — His duty to make the loss as small as possible.

A city which, for its water supply, has under legislative authority impounded certain streams tributary to the Sacandaga river is not liable, for damages resulting from the water thus diverted, to a manufacturer on the river, thirty-two miles below, employing both steam and water power, where it appears that at low water the water flowing in the river is one thousand times the amount diverted,

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that the amount diverted would create less than two horse power in a working day, that the manufacturer's dam is leaky and that he has long permitted it to remain so.

Quaere, whether the title to the bed of the Scandaga river is in the State?

ACTION by plaintiff to recover damages for perceptibly and materially diverting and diminishing the water at his mill.

D. H. McFalls and M. D. Murray (Edgar T. Brackett, of counsel), for plaintiff.

James H. Drury (Frank Talbot, of counsel), for defendant.

HOUGHTON, J. The plaintiff is the owner of a water power on the Sacandaga river, at Conklingville, in Saratoga county. The Sacandaga river empties into the Hudson about seven miles below the plaintiff's premises, and is the largest tributary of that river. It rises in Hamilton county eighty miles or more from its mouth, and has a watershed averaging forty to fifty miles in breadth. Innumerable streams flow into it, one of which is the Mayfield creek. Near the head-waters of Mayfield creek, and thirty-two miles from the plaintiff's dam, the defendant has constructed reservoirs and intakes upon five streams for the purpose of furnishing a part of the water for its municipality and inhabitants

The ordinary minimum flow of these streams is 2,232,000 gallons per day. The defendant has taken only an average of 1,000,000 gallons of this flow. This taking began fifteen years ago.

The soft timber has been practically cut from the Sacandaga valley for twenty years, and the water in the Sacandaga river has been gradually growing less since that time, and the testimony shows that it is one-third less now than it was before 1880. This diminution of water applies to all the tribuaries of the river, the streams appropriated by the defendant as well as the others.

It is only in extremely dry periods that water does not flow past defendant's dams and reservoirs, and it is only for short periods that such flow is impeded.

The plaintiff's dam, up to a year ago, was about seven feet in height, and was an old dam which leaked at all times of the

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year. The defendant's pondage runs back twelve to fourteen miles. The amount of water in the Sacandaga river, at low water, is a thousand times greater than the amount of water taken by the defendant. The plaintiff's dam is 300 feet in width, and the 1,000,000 gallons taken by the defendant in each twenty-four hours would make a difference of about one-sixth of an inch in the depth of the water at the dam.

The plaintiff used steam in his mill for a long time prior to the erection of defendant's water system. His manufactory is run ten hours a day. With the head which he has, the 1,000,000 gallons taken by the defendant in twenty-four hours would make 1.88 horse power for ten hours.

The plaintiff brings this action against the defendant to recover damages for perceptibly and materially diverting and diminishing the water at his mill.

The defendant insists that the Sacandaga river is a public stream, the title to the bed of which is in the People, and that the plaintiff owns only to ordinary high-water mark, and not to the thread of the stream, as in ordinary cases, and that because the Legislature authorized the defendant to construct its water system and take the water of a part of the tributaries of the river, the plaintiff has no standing.

The maps of the early patents describe the Sacandaga river as the west branch of the Hudson, and the grants are bounded by the banks of the stream. From this the defendant deduces that the People still retain title to the bed of the stream, and that the rule which has been applied to the Hudson river is applicable to the Sacandaga.

The courts have repeatedly held that the rule was different with respect to the ownership by riparian proprietors on the Hudson and Mohawk rivers from that which applied to other rivers of the State. This arose from the language of the grants along these two rivers, which were construed by the rules of the civil law prevailing in the Netherlands, from whose government title was derived. The bed of the Hudson river below Waterford has been conceded to belong to the People of the State, and the rights of riparian owners have been treated in a quite different manner from those upon that portion of the river above that point. The courts, at an early date, however, did extend the rule as far north as Stillwater (Palmer v. Mulligan, 3 Caines, 308), which is fifty miles or more

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further down the river than the mouth of the Sacandaga. I do not think it has been generally understood that the rule of law, that the riparian owner upon the Hudson owned only to ordinary high-water mark, was applicable to the upper Hudson above Glens Falls. Without deciding that point, however, I think the plaintiff, as riparian owner, even if the Sacandaga river be construed to be a public stream and the title to its bed in the People, has the right to have the water flow past his premises, and has the right to use the water as against every one except the People of the State, and as against them even, only that he shall not interfere with public navigation; and that the Legislature had no authority to give to the defendant the privilege of unlawfully diverting the head-waters of any of the tributaries of the river. Even upon the Hudson river below Waterford, it is held that the State cannot compel a riparian owner to remove a wharf constructed upon the shoals in front of his uplands, unless it is shown that the wharf is actually a nuisance, or an obstruction to navigation, and interferes with the public right to use the stream. People v. Mould, 37 App. Div. 35.

The Sacandaga river is not actually navigable below the plaintiff's premises, and navigable above only for a comparatively short distance. Even if it be treated as a purely navigable river, the bed of which is owned by the People of the State, it is no defense to a person doing injury to a riparian owner's rights. Palmer v. Mulligan, 3 Caines, 311.

The right to use water as it flows is a property right; yet, the water itself is not the subject of exclusive ownership or dominion either by the sovereign power or an individual. Sweet v. City of Syracuse, 129 N. Y. 335. Riparian owners, therefore, upon navigable streams even, as against other individuals, have the right to use the water as it flows past their premises. And whether a dam or other structure is a public nuisance is not for the wrongdoer to say, but that question is between the People and the riparian owner. Stiles v. Hooker, 7 Cow. 266; Harris v. Thompson, 9 Barb. 350.

Even if the defendant was authorized by act of the Legislature, specifically, to take the water of some of the tributaries of the Sacandaga river, this would be unavailing as a defense to an invasion of the rights of the plaintiff, because the State has no right to convert the waters, or authorize their conversion, for any

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other use than the purposes of navigation. Smith v. City of Rochester, 92 N. Y. 464.

I think the case at bar, therefore, is to be passed upon irrespective of whether the State owns the bed of the Sacandaga, or whether the Legislature, owning the bed of the river, authorized the defendant to appropriate for its water system some of its tributary streams; and the question is, whether or not the taking of one one-thousandth part of the water of the stream upon which the plaintiff's dam is situated, under all the circumstances disclosed, is such a perceptible and material diminishing of the flow, as will compel the court to recognize it and award damages therefor.

Conceding to the utmost the plaintiff's rights upon the stream, I think judgment must be for the defendant. The use of water by riparian owners is always subject to the use by others. The use by an upper riparian owner always interferes somewhat with the use by a lower riparian owner. Each, having a right, may exercise that privilege in a reasonable way, even if it inconveniences the other.

All municipalities must be supplied with water. If, in the taking of that, there is immediate perceptible damage to a lower riparian owner, he must be compensated. But there must be an end to damage or injury which the courts are required to recognize and compensate for. Technically, the taking of any quantity of water injures a riparian owner, however distant he may be. In the dry season, even a little water which is taken at various points from an extensive stream, running through a thickly-inhabited district, in the aggregate, may diminish the flow at a lower point. If the courts are to recognize such diminutions and give nominal damages therefor, interminable litigation would result, and ruinous expense be incurred by every village and city. The taking of the 1,000,000 gallons which the defendant takes, if it affects the plaintiff in such manner as to compel the court to award him damages, would compel the court to give damages, actual or nominal, to every mill-owner on the Hudson river from the point where the Sacandaga enters. Steamboat companies navigating the Hudson might have a right of action as well as riparian owners along its banks, until it flows into the ocean, because it must be confessed that some water has been taken, and thereby the flow somewhat diminished. The same principle would allow the power companies at Niagara

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Falls to maintain actions against the city of Chicago, and the various cities along the borders of the great lakes taking water for their municipalities. But the courts do not recognize such infinitesimal injuries, and hence the rule, which has been such as long as the law has been formulated, that there may be injury without damage. The necessity that municipalities be supplied with water, which can ordinarily only be obtained by taking it from some large stream or some tributary to it, makes it incumbent upon the courts to refuse to give damages for a mere technical injury.

But a complete answer to the claim of the plaintiff is that he could have prevented the injury if he had kept his dam in such condition as to hold the water which flowed past his premises. The proof shows that at all times during the dry season the dam was in such a leaky state that more water flowed through it than was taken by the defendant. The action is for actual damages suffered. These are the diminished rental value of the plant as it was, or, at most, what it would cost to create the lost power. If the defendant is liable at all, it is liable not for the possible injury in case plaintiff had had a better dam and mill, which could have done more effective work, but for the actual injury done to him as the plant then was. Gallagher v. Kingston Water Co., 25 App. Div. 84. The plaintiff could not allow holes to remain in his dam through which more water was lost than the defendant took, and then complain that he did not have water enough to run his mill, and charge that lack of water to the defendant, when, by stopping the holes, he would have had sufficient. It is a rule, recognized in all classes of actions for damages, that a party who seeks damages from another must have done what he reasonably could to diminish the injury and reduce the damage. Hogle v. N. Y. C. & H. R. R. R. Co., 28 Hun, 363. The plaintiff could not, therefore, stand by and say that he would do nothing towards keeping his dam in proper repair so that it would hold the water which did actually flow, and then ask the defendant to pay all damages for loss of power, when, if he had put reasonable repairs upon his dam, he would have suffered no loss.

The complaint must be dismissed upon the merits, with costs. Decision may be prepared in accordance with the above.

Complaint dismissed, with costs.

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ROLLIN E. DOOLITTLE, Appellant, *v.* IRVING P. FITCHETT, Respondent.

(Supreme Court, Saratoga Special Term, July, 1901.)

Evidence — Parol, when inadmissible to vary a written contract.

Where an executory contract for the sale and delivery of printed matter to advertise a business is complete in itself and on its face, and it is shown that the whole contract has been reduced to writing, it is erroneous for the trial court to admit, in an action for the price, evidence upon the part of the vendee importing into the contract an additional collateral parol condition.

APPEAL from a judgment of a justice's court.

F. B. Phillips, for appellant.

J. L. Henning, for respondent.

HOUGHTON, J. The plaintiff sued the defendant in Justice's Court for the price of certain advertising matter, and claims that the entire contract is embraced in the order given by the defendant, which is as follows:

"The Art League, 320 Broadway,
New York.

"GENTLEMEN.— Send one single column cut and copy reading matter every other week to use in this city only, to advertise the drug business, for one year, and until further notice. I will pay you $1.00 and postage for each cut, at the end of the month they are sent.

"(Signed) I. P. FITCHETT, Name.
"Saratoga Springs, N. Y., address.

"We agree not to send these cuts to any one else in your city during this time.

"THE ART LEAGUE.
"per E. E. DAVIS, *Agt.*

"Dated August 21, 1896.
"To begin Sep. '96."

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In the margin is printed, "Any arrangement made with agent must be specified plainly on this order."

The defendant says that he had a collateral separate agreement with the agent to whom he gave the order, that all cuts and reading matter should be submitted to him, and that he was to take none and pay for none unless they were satisfactory.

Cuts and reading matter were furnished at a very small price, in view of the fact that they were what is known as syndicate cuts to be sent throughout the country, presumably to very many patrons, in order to cover the cost of the producing and to make the business profitable.

Cuts were sent and the defendant did not approve of them, and finally refused to accept any or make any payment. The court below allowed evidence of the submission of sample, and the fact that they were unsatisfactory, and rendered judgment for the defendant. The competency of this evidence is the only question involved. The county judge is disqualified and the appeal comes to this court.

The order was in writing. It was accepted by plaintiff's assignor and the cuts were furnished. In addition, the plaintiff's assignor agreed not to furnish the cuts to any other person in the village of Saratoga Springs. The contract, therefore, so far as binding both parties, is complete.

In order to bring a case within the rule admitting parol evidence to complete an entire contract, of which the writing is only a part, two things are essential: First, the writing must not appear, upon inspection, to be a complete contract; second, the parol evidence must be consistent with and not contradictory to the written instrument. Thomas v. Scutt, 127 N. Y. 133. It is not a violation of the rule that parol evidence is not admissible to vary the terms of a contract reduced to writing, to show that even a complete contract was not to become a binding one until the performance of some condition precedent resting in parol (Reynolds v. Robinson, 110 N. Y. 654); or that it was not to operate as a contract until the other party had performed some act on his part to be done. Blewitt v. Boorum, 142 N. Y. 357. And, of course, a party can always show want or failure of consideration, and explain any ambiguity, if one exists. House v. Walch, 144 N. Y. 418.

The defendant claims that the evidence was proper under the

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authority of Chapin v. Dobson, 78 N. Y. 74, and kindred cases. The plaintiff contends that the contract, upon its face, is complete, and that the parol evidence allowed was not consistent with the contract, but contradictory to it.

The contract does, upon its face, show what was ordered, when it was to be furnished, and time of the continuance of the contract, the amount to be paid and the terms of payment, and the further stipulation that no one else in the locality shall be furnished with the same advertising matter. Nothing appears to be lacking in the contract, unless it be, what the defendant claims, that he was to be allowed to inspect the cuts, and not to be bound to take or pay for them in case they were not satisfactory.

Upon the face of the contract, signed by the defendant, and on the margin is a statement that any arrangement made with the agent must be specified plainly on the order, thus indicating that the plaintiff's assignor was not to be bound by any arrangement made with its agent, unless that arrangement was made a part of the written contract. The contract was signed by the defendant, without the stipulation that he should be allowed to inspect the cuts and approve of them before acceptance. The contract having been reduced to writing, without this stipulation, I think the defendant was bound by it, and that the rule laid down in Chapin v. Dobson, 78 N. Y. 74, does not apply. In that case, the order was to manufacture certain machinery, and the ruling there enunciated might well have been put upon the ground that there was an implied warranty on the part of the manufacturer that the machine would do the work for which it was intended. But the contract there was one to manufacture, and in the present case the contract was to buy certain wares. They were cuts necessarily expensive to manufacture, and were in stock, and, of course, could not be manufactured expressly for the defendant at any such price as was agreed to be paid.

In view of the statement on the margin, that any further agreement with the agent should be specified in the order, and, none being specified, I think the contract shows, upon its face, that it contained the whole agreement between the parties, and that, therefore, oral evidence of another contract, not appearing, was improperly received.

In the case of Costello v. Eddy, 34 N. Y. St. Rep. 565, and in the case of Love v. Hamel, 59 App. Div. 360, oral evidence

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was excluded of the further contract that the parties selling should not engage in the same business thereafter. I think, in principle, these cases control the present case, especially in view of the fact, which did not appear in the case of Chapin v. Dobson, *supra*, that, upon the face of the contract, it appears that all the stipulations were reduced to writing.

It follows that the court below was in error in admitting the oral testimony objected to, and the judgment for the defendant must be reversed.

Judgment reversed, with costs.

Matter of the Application of FRANK E. GRIFFIN, for an Order under Section 16 of the Liquor Tax Law, Authorizing and Directing a Special Town Meeting, in and for the Town of Union, Broome County, N. Y.

(Supreme Court, Broome Special Term, July, 1901.)

Liquor Tax Law — Resubmission of local option because all the legal voters of a district had not opportunity to vote.

The statutory local option questions must be resubmitted to the people of a town where proof is made to the Supreme Court that, owing to the failure of the officers of the town properly and sufficiently to redistrict it, there was such congestion at the polls of one district that all its legal voters had not opportunity to vote at the annual town election upon the said questions and that a considerable number of electors were standing in line waiting to vote upon them when the polls closed.

MOTION or proceeding to set aside an annual town election, and application for a special election, asking for the resubmission to the people of the town of Union of the four questions under section 16 of the Liquor Tax Law.

Mangan & Mangan, for petitioner.

Radcliffe Park, for the Town of Union.

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FORBES, J. This is a motion or proceeding to set aside an annual town election, and an application for a special election, asking for the resubmission to the people of the town of Union, Broome county, N. Y., of the four questions under section 16 of the Liquor Tax Law.

The difficulty in this contest arises, principally, from one cause. The town of Union, prior to March, 1901, was composed of three election districts. The principal question arises out of the election in the first district, in that portion of said town known as the village of Lestershire.

It is apparent, from the moving papers and all the affidavits submitted, that the proper election officers of the town of Union had neglected to redistrict said town prior to the submission of the question of local option, under the four propositions referred to; also that the village of Lestershire was composed of but one election district, known as the first election district of the town of Union. The number of legal voters in said district was something more than 1,300.

At the time of the submission of the question of local option, on the 6th day of November, 1900, it is asserted that more than 200 legal voters, wishing to exercise the elective franchise, were deprived of their votes and were actually disfranchised, through the inadequacy of proper polling places and voting opportunities in said district; and that, while the election officers performed all of their duties, at said election, in receiving votes, still the number of legal voters was so great, that it was absolutely impossible for said officers to receive and record their votes, and that about 250 legal voters were standing in a line formed and ready to vote when the polls closed.

The policy of the law is that no legal voter shall be improperly and unnecessarily disfranchised; that all such voters shall have a fair opportunity to vote once, and to have that vote counted; and when that vote is so given and counted, it must fairly record the will of the voter and, therefore, of the people of the town, on the question of local option, to the end that the law in that respect may be impartially and rigidly enforced.

It was the duty of the proper town officials to so redistrict the town, as that all electors wishing to vote may have a fair opportunity to do so, and the expression of an opinion so made must be regarded on that subject as the highest law of the land. There

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should be no other sentiment about this proposition. The law should be enforced, with a firm desire to do justice by all persons who are legal voters, who desire to vote.

There is but little doubt or even dispute in this case, that the electors of the village of Lestershire had no such opportunity; and that, as a matter of right, they must be permitted to use the elective franchise in a legal and proper manner.

"The very object of an election is to ascertain the popular will, not to thwart it. The object of the election law is to secure and preserve the rights of duly qualified electors, and not to defeat them. Statutory regulations are enacted to promote justice and secure freedom of choice, not by technical obstructions to make the right of voting insecure and difficult.

"The votes of innocent electors should not be invalidated by irregularities, or unauthorized acts or omissions, on the part of public officers charged with the duty of preparing and printing official ballots, or furnishing proper and suitable polling places for the safe deposit and canvass of the votes of electors of the district."

When the expression of the will of the people has been once fairly made, the courts and juries will never hesitate to enforce the law as it stands upon the statute. People ex rel. Hirsh v. Wood, 148 N. Y. 142; Matter of Stewart, 155 id. 545.

The last annual election in the town of Union, when the four questions, under the Liquor Tax Law, were submitted to the people, must be set aside, and said election so far vacated that a resubmission to the legal voters of those four questions may be made under the law.

The prayer of the petitioner must, therefore, be granted, and a special election is hereby ordered to be held in said town, under and in pursuance of the statute in such case made and provided, to the end that the will of the people may be properly and legally expressed on the question of local option.

The motion is granted, with costs, and a proper order may be prepared accordingly.

Motion granted, with costs.

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HARRIET N. CATLIN, Plaintiff, *v.* SAMUEL REA and JOSEPH JOHNSON, Defendants.

(Supreme Court, Erie Special Term, July, 1901.)

Foreclosure — Referee may convey within twenty years — Failure to file report of sale — Deed to a deceased purchaser — Assignee in possession.

A referee in foreclosure may, as against the mortgagor's widow claiming dower, execute a deed within twenty years of the judgment, as not until then does a presumption arise that the mortgage debt has been paid or the judgment satisfied.

A referee's deed, otherwise valid, conveys title, although no report of sale was ever filed and there is no proof, beyond the recital in the deed, that notice of sale was duly published.

A referee's deed to the purchaser at the sale, deceased at the time of its execution, running to her, "her heirs and assigns forever", is valid where the deed recites the sale and the payment of the bid and the heirs indicate acceptance of the deed by subsequently conveying the premises covered by it.

The proper practice is, however, to have the deed run to the personal representatives of the purchaser.

Where, in addition to the foregoing facts, it appeared that the grantee of the heirs entered immediately into possession and, by herself or her mesne grantees, remained therein undisturbed by any claim by or under the mortgagor for seventeen years, the court considered that the present holders of the title had become assignees of the mortgage, in possession, and that ejectment would not lie against them.

MOTION to set aside a direction dismissing the complaint and for a new trial.

Henry A. Dann, for motion.

Louis L. Babcock, opposed.

KENEFICK, J. This is an action in ejectment to recover possession of certain real estate in the city of Buffalo, lying between the Buffalo and Hamburg Turnpike and Lake Erie. Philander B. Catlin acquired title to this land in the year 1857. The prem-

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ises were then subject to the lien of a mortgage given by a prior owner of the land in 1851 to one Reuben B. Heacock. An action to foreclose this mortgage was instituted in 1863 by the executors of the mortgagee, and Catlin and the plaintiff herein, his widow, were made parties defendant, and personally served with summons and notice of object of action therein. No defense was interposed to the action. A referee was appointed to compute the amount due, and upon the coming in of the referee's report a judgment of foreclosure and sale was granted on the 26th day of October, 1863, wherein one Joseph L. Fairchild, a counselor-at-law, was appointed referee to sell the premises.

The foregoing facts appear from the records put in evidence in the case. So far as the evidence discloses no report of sale was ever made by the referee, nor was any order confirming a report of sale ever granted or entered. About eighteen years after the entry of the judgment of foreclosure the referee executed a deed of the premises to Eliza C. Heacock, who was then dead, which deed is dated November 23, 1863, and is acknowledged September 16, 1881, and recorded September 21, 1881. This deed, after setting out the judgment of foreclosure, recites that the referee in pursuance thereof sold the premises on the 23d day of November, 1863, at public auction; that due notice of the time and place of such sale was first given, and that the premises were fairly struck off to the grantee named in the deed for the sum of twenty-five dollars, that being the highest sum bidden for the same; and that the referee, in order to carry into effect the said sale, and in consideration of the payment to him of the money so bidden as aforesaid, the receipt of which is acknowledged, granted and conveyed the premises to the said Eliza C. Heacock, "her heirs and assigns forever." Subsequently, and by deed dated January 14, 1882, the heirs of said Eliza C. Heacock, conveyed the premises to one Emma Slade, through whom the defendant Rea, by mesne conveyances derives his title.

The plaintiff herein claims the legal title to said land by virtue of her alleged dower therein, as widow of Philander B. Catlin, and by virtue of a deed from the heirs of said Philander B. Catlin, bearing date November 30, 1899, and purporting to convey the premises to her.

The land in question is described by all of the witnesses as swamp land on which some willows and underbrush grew. It

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does not appear to have been occupied by any person until the year 1885, when Mrs. Slade erected a pier or dock extending from the shore into the lake, for the removal of sand from the premises. The land was occupied for this purpose during the years 1885 and 1886, and then the business was discontinued.

The plaintiff's claim in substance is that the referee's deed purporting to convey the premises to Eliza C. Heacock, is a nullity, and that as more than twenty years have elapsed since said mortgage became due, and since the entry of said judgment of foreclosure a presumption of payment of said mortgage and a satisfaction of said decree accrues by operation of law.

Two objections are urged to the validity of the deed, viz.: First, that the referee had no power to execute it eighteen years after the entry of the judgment and the alleged sale of the premises; Second, that the grantee named in the deed was dead at the time of its execution, and, therefore, there was no delivery of the deed.

We will examine these objections in the order in which they are stated.

There is no provision of law prescribing when the referee shall execute this conveyance. It is contended, therefore, that it was his duty to execute it within a reasonable time, and failing to do so an application should be made to the court for authority to execute it. Under this rule it is urged that the referee had no power to execute the deed in question.

In passing, it may be observed, that if the deed is valid it conveys title, notwithstanding the fact that no report of sale was filed, and that there is no proof, except the recital in the deed, that notice of sale was published as required by law. Farrell v. Noel, 17 App. Div. 319.

Plaintiff relies upon the case of Rucker v. Dooley, 49 Ill. 377, to sustain the rule of reasonable time. In that case it was held that a sheriff had no power to execute a deed eight years and three months after a sale on execution without applying to the court for authority to do so. The court fixes the above limitation by adding to the period for redemption, viz.: Fifteen months, the time during which the judgment remains a lien, viz.: Seven years. This rule has, however, never been recognized in this state, and the courts have assumed the validity of sheriff's deeds on sales under execution, where much longer periods of time have elapsed between the sale and the delivery of the deed.

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In Reynolds v. Darling, 42 Barb. 418, a period of almost twenty years had intervened; in Cook v. Travis, 20 N. Y. 400, a period of thirty-three years; in Dumond v. Church, 4 App. Div. 194, a period of about twenty years. The present case, however, is not a sale under an execution but under a decree of foreclosure. Such a decree is deemed simply an additional security for the debt already secured by the mortgage, and until the lapse of twenty years no presumption of payment of the debt or satisfaction of the decree accrues. Barnard v. Onderdonk, 98 N. Y. 158.

It follows, therefore, that as against the plaintiff, who virtually represents the mortgagor, the referee had full power within twenty years to execute the deed pursuant to the direction contained in the judgment of foreclosure.

We now turn our attention to the second objection, viz.: That the deed was a nullity, in that the grantee was dead at the time of its execution.

The general rule is that a deed of a present estate to a party not living at the time of its execution is void. Jackson v. Phipps, 12 Johns. 418.

In Missouri, where the statute authorized the sheriff to make a deed to the "purchaser" of real estate sold by him under execution, it was held that where a purchaser dies after paying the purchase price, but before the execution of the sheriff's deed, the deed is properly made to the heirs. Swink v. Thompson, 31 Mo. 336.

Our Code of Civil Procedure makes express provision for such a contingency in sales on execution, "Where a person, entitled to a deed, dies before the delivery of the deed, the sheriff must execute and deliver the deed to his executor or administrator. The property so conveyed must be held in trust for the use of the heirs or devisees of the decedent, subject to the dower of his widow, if there is one; but it may be sold, in a proper case, for the payment of his debts, in the same manner as land, whereof he died seized." § 1473.

In the absence of a statute governing the practice in sales on foreclosure, the deed should run to the executor or administrator of the deceased person in conformity with the practice prescribed for deeds on execution sales.

I am of the opinion, however, that this deed in the form in which it is executed may be upheld. The substantial title of the mortgagor passed to the purchaser at the time of the sale and the pay-

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ment of the bid, and the recitals in the deed as to such sale and payment may be accepted, in the absence of contradictory evidence, as conclusive proof thereof. The execution of the deed was a ministerial act which could have been compelled by the purchaser, or those claiming under him.

By the doctrine of relation the execution and delivery of the deed may relate back to the time when the purchaser was entitled thereto. Jackson v. Bull, 1 Johns. Cas. 84; Demarest v. Wynkoop, 3 Johns. Ch. 146.

It is further to be noted that the heirs of the grantee by their subsequent conveyance to Emma C. Slade, indicated their acceptance of the deed.

Again, what right has the plaintiff, standing in the place of the mortgagor, to question to whom the referee's deed shall run? A valid judgment having been granted and a valid sale having occurred, the mortgagor was completely divested of his equity of redemption. The foregoing views necessarily lead to a denial of this motion. If, however, they are not sound, there is another aspect of the case which leads to the same result.

Assuming that this referee's deed can have no force or effect *as a deed,* yet the recitals therein as to the sale, the purchase by Eliza C. Heacock and the payment of the purchase price must be accepted as proof of those facts. Eliza C. Heacock, therefore, acquired all the rights of the mortgagee and became in effect an assignee of the mortgage. Her heirs subsequently conveyed all their rights therein to Emma C. Slade, who entered into actual possession of the premises under this conveyance, and from the time of such conveyance in 1882 down to the deeding of the premises to Albright, the defendants' grantor, in 1900 paid the taxes thereon. It does not appear that the mortgagor or his heirs ever exercised any acts of ownership over the land subsequent to the judgment of foreclosure until about the year 1899, when the plaintiff attempted to take possession. It thus appears that the assignee of the mortgagee, acting under color of the referee's deed to Eliza C. Heacock and the subsequent deed from her heirs, entered into possession of the lands and remained in undisputed possession until just prior to the commencement of this action. These circumstances fairly warrant the finding of an implied consent of the mortgagor to such possession, and thus the defendants by acquiring all the rights of Emma C. Slade became the assignee of

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the mortgage in possession against whom an action of ejectment will not lie. Wing v. Field, 35 Hun, 617; Van Duyne v. Thayre, 14 Wend. 233; Phyfe v. Riley, 15 id. 248; Finn v. Lally, 1 App. Div. 411; Townshend v Thomson, 139 N Y. 152; Lockwood v. McBride, 53 N. Y. Super. Ct. 268.

The motion for a new trial is denied.

Motion denied.

THE OSWEGO CITY SAVINGS BANK, Plaintiff, *v.* THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 2, TOWNS OF MANHEIM AND OPPENHEIM IN THE COUNTIES OF HERKIMER AND FULTON, STATE OF NEW YORK, Defendant.

(Supreme Court, Herkimer Special Term, July, 1901.)

Union free school district — Validity of its bonds — Sales at par and for cash — Printed bonds substituted for typewritten.

A union free school district may under the statute (L. 1895, ch. 273, § 10) lawfully issue bonds to buy a site for a school and a schoolhouse already erected thereon, and the fact that a very small part of the purchase price represents property, not properly school property, will not invalidate the entire issue of the bonds, in the hands of a *bona fide* purchaser.

Where the agent of a private society owning a schoolhouse, its site and fixtures, bid off the bonds at public auction at par and then went with a representative of the union free school district to a bank, which furnished the purchase money, and the agent of the society went through the form of tendering and paying to the said representative said money as the price of the bonds, and the agent of the school district then tendered and paid back to the said representative the same money and thereupon received a deed of the site, the court considered that the statute, as to sales at par and for cash, had been satisfied and that the bonds had a legal inception.

Where such bonds, originally written upon a typewriting machine and executed by officers of the union free school district, were declared by brokers unmarketable in that form, and, after mutilation, were replaced by printed bonds of the same tenor and execution, the court considered that the printed bonds were valid and that the offi-

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cers of the school district had not exhausted their powers when they executed the typewritten set — it appearing that the mutilated bonds had never been presented for payment.

THIS is an action at law, brought to recover on a certain bond for $1,000, claimed to have been issued by the defendant, and which bond is one of a series of $18,000, issued in the year 1895, and becoming due $1,000 each year. The plaintiff seeks to recover as a *bona fide* holder of said bond for value, and various defenses are alleged by the defendant impeaching the validity of the entire issue of said bonds. These defenses and the various material facts appearing in the case are outlined in the opinion.

Elisha B. Powell, for plaintiff.

A. M. Mills, for defendant.

HISCOCK, J. There is practically no dispute of fact in this case. In 1895, there was a private educational corporation at Dolgeville, N. Y., known as the Dolgeville School Association. It owned a schoolhouse and site, with fixtures and some personal property and appliances. The plan originated for a purchase of this property by the defendant for the sum of $18,000, said purchase price to be met by the issue of bonds. The proposition of sale made by the Dolgeville School Society showed a valuation of real estate of $19,500, and a valuation of fixtures and personal property of $2,158.54, for all of which the school society agreed to accept the sum of $18,000. All of the personal property included in said valuation was naturally incident to the maintenance and operation of a school, and a large portion of it might be regarded as ordinary fixtures, such as desks, cupboards, racks, etc. The appraised valuation of the other personal property, which, perhaps, could not be regarded as fixtures naturally and necessarily appurtenant to a schoolhouse, did not exceed, upon the basis of $18,000 for the entire plant, a few hundred dollars.

Steps which are conceded, upon the submission to me, to have been sufficient and properly and legally taken, were taken under the statute, through and at a meeting of the voters of the district, to authorize the acts and vote the taxes necessary for the purchase of this property, and subsequently the trustees of said school dis-

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trict took what are likewise conceded to have been the necessary and proper preliminary legal steps for an issue of bonds with which to pay for said property.

As I have stated, no question is made upon this submission to me, but what the necessary and proper legal and statutory steps were taken at the meeting of the voters of the district, and by the board of trustees, to authorize the purchase of the property in question, and the issue of bonds with which to provide means of paying therefor, subject to the claim of defendant that the purchase included the purchase of certain property which could not be met under the statute with an issue of bonds. The bonds were duly advertised and sold at auction in form as provided by statute. Upon such auction one Armstrong, who really represented the school society which was selling the property, bid off the bonds at par as provided by the statute. At the time he paid no cash for them, but subsequently he went with some officer representing the defendant to a bank in Herkimer. There Armstrong went through the form of tendering to the representative of the defendant $18,000 for the bonds purchased and the representative of the defendant went through the form of tendering and paying said $18,000 to the representative of the selling school society for the property which was to be purchased as aforesaid. As a matter of fact, the $18,000 was furnished by the bank and was not carried away by anybody, and the net result was that the selling school society got the $18,000 of bonds and the defendant obtained the deed for the property which was to be sold.

These bonds which were so delivered had been duly executed by the proper officials of the defendant, and were regular in form and within the provisions of the statute. They were, however, struck off upon a typewriter. Subsequently, one Alfred Dolge, who was the president of the board of education of the defendant, and likewise a member of the executive committee of the Dolgeville School Society, the vendor, went to New York for the purpose of disposing of the bonds. He went to some brokers, who, in effect, told him that they could not dispose of typewritten bonds, but that it would be necessary to have them printed and struck off in the form usually adopted for such bonds. The brokers caused printed forms of bonds to be struck off, and subsequently sent them to Mr. Dolge, who had returned home. Number one of the original bonds was never reprinted or exchanged in any manner,

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but for the other seventeen bonds of the issue Mr. Dolge procured the bonds prepared under the supervision of the brokers to be duly executed by the proper officials of the defendant in proper form, and subsequently he went with said second lot to New York to the brokers. The original typewritten bonds were cancelled and mutilated by being cut up and slashed with a knife, and were delivered back to the defendant, through its president, Mr. Dolge, the brokers taking the seventeen newly prepared bonds executed as aforesaid, paid the purchase-price thereof, and subsequently, in the ordinary course of business, disposed of them, the one in question coming into the hands of the plaintiff, who paid value therefor and became a *bona fide* holder thereof. The original typewritten bonds, cancelled and mutilated and delivered to Mr. Dolge, an officer and representative of the defendant aforesaid, seem to have been passed around some subsequently, it being claimed that they passed into the possession of the vendor school society above named. At any rate, no claim has ever been made upon them, or that they were still outstanding, nor have any of the coupons thereof been presented, but they have been produced upon the trial of this action and submitted as exhibits. For several years the defendant paid the coupons upon this and other bonds, and no question was raised in regard to their validity.

Upon these facts, the defendant insists that said issue of bonds, including plaintiff's, is invalid, for the following reasons, in substance:

1. That they were issued for the purpose of meeting the purchase-price of the site, and a schoolhouse already standing thereon, and of certain personal property, and it is claimed that the statute did not authorize such issue.

2. That the transaction between Armstrong, the purchaser of the bonds, and the defendant, as it is claimed by defendant, amounted to an issue of the bonds for the purchase price of the property, and there was not a sale of the bonds for cash as contemplated by the statute.

3. The bonds, of which plaintiff's is one, were not the bonds originally executed by the defendant's officers, and, as claimed, the authority of such officers was exhausted when they signed and executed the typewritten bonds, and they had no power to execute the printed or lithographed bonds in the place thereof

I will discuss these defenses in the order stated:

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1. Defendant's counsel does not argue very strenuously that these bonds are invalid because issued for the purpose of acquiring a site with a schoolhouse already on it, rather than for the purpose of acquiring a site and of then building a schoolhouse thereon, although he suggests that question. He argues more strenuously the proposition that this purchase included certain personal property, and that because the value of such personal property was included in the sum of $18,000, for which these bonds were issued, the entire issue is invalid. I am not able to conclude that bonds held by a *bona fide* holder upon which interest has been paid without question for years should be held invalid, because of any of the facts which appear in this case in respect to the two points suggested. That part of the section covering this subject, being section 10 of chapter 273 of the Laws of 1895, as amended, which relates to the issue of such bonds as these, should be considered and construed in the light of the preceding part of the section. Such preceding part of the section provides that "A majority of the voters of any union free school district * * * may authorize such acts and vote such taxes as they shall deem expedient for making additions, alterations or improvements to or in the sites or structures belonging to the district, or for the purchase of other sites or structures, or for a change of sites, or for the erection of new buildings, or for buying apparatus or fixtures." The provision especially relating to the issue of bonds, then says, "*For the purpose of giving effect to these provisions,* trustees or boards of education are hereby authorized, whenever a tax shall have been voted to be collected in installments for the purpose of building a new school house, or building an addition to a school house, or making additions, alterations or improvements to buildings or structures belonging to the district, or for the purchase of a new site or for an addition to a site, to borrow so much of the sum voted as may be necessary * * * and to issue bonds, etc." It will thus be seen that the provision of the statute governing the meeting of the residents of the district is broad enough to authorize the purchase of a site or a building or a site and a building and also to authorize the purchase of personal property and fixtures, and then the board of education or the trustees are authorized to issue bonds "for the purpose of giving effect to these provisions." I think it would be a very narrow construction of the latter provision to hold that it authorized the issue of bonds with which to buy a

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site or with which to build a building, but did not authorize the purchase of a site with a building already thereon as in this case. The latter provision, with reference to the issue of bonds, certainly does not recapitulate in words all of the purposes for which the voters are authorized to vote and provide. It perhaps is incomplete in this respect, but certainly it is to be construed somewhat with reference to the first provisions. So with reference to the personal property which was involved in this purchase. Even if it should be held that the provisions directly relating to the issue of bonds excluded the purchase of personal property as one of the items for which bonds might be issued, I still think that the entire issue of bonds in the hands of *bona fide* purchasers should not be held invalid because an inconsequential item of that kind has been included in the aggregate sum. Manifestly the value of what could be regarded as personal property in this case as distinguished from furniture and fixtures naturally appurtenant to a school house would be very insignificant as compared with the total amount. There seems to be no doubt but what the representatives of the defendant acted in good faith in issuing the bonds in question, and if they have made a mistake in including a small item of this kind in the total issue it should be disregarded as against such a holder of the bonds issued as plaintiff. It should rather be regarded as a mistake upon the part of the officers acting for and representing the defendant with which the defendant should be charged rather than a mistake or error so material and vital as to invalidate the entire issue of bonds.

2. The statute did require that the bonds issued by defendant should be sold at public auction rather than that they should be passed to the society selling the property without sale. The provision of the statute with reference to a sale of said bonds at public auction was fully complied with. There is no question but what the sale was duly advertised and but what it took place in due form, and Armstrong who bid for the bonds bid them off at such public auction. The sale was open to everybody and anybody might have bid against him and secured the bonds. As he bid the full amount required by the statute — par — he secured the bonds. In view of the fact that they bore 3 per cent. interest, and of the year when they were sold, it will not be claimed that they sold at a disadvantageous price. Having passed this sale, we then find the vendor, school society, through Armstrong, the

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purchaser of the bonds and the holder of the property to be sold, and find, upon the other hand, the defendant, the seller of the bonds and entitled to receive the purchase price of $18,000 therefor, and the purchaser of the school property in question, for which it was to pay $18,000. It is said that the passing of the money from Armstrong to the defendant for the bonds and from the defendant to the society which Armstrong represented for the deed was a mere form. Very possibly that was so. It would seem difficult to avoid having it more or less of a form. It was the right of the defendant to receive the money for the bonds. It was its duty immediately to pay it back to the person from whom it had been received for the deed and receive the deed, and this was what was done. It is difficult to see how it could have been done much differently. It does not seem that it was necessary for the school society to take the $18,000 which it received from Armstrong, the purchaser of the bonds, and put it into the bank and keep it there for a considerable length of time before using it, or to go to the trouble of taking $18,000 of other money with which to pay the school society for the deed. The main thing required by the statute, namely, a sale of these bonds at public auction, at which anybody could bid, was substantially fulfilled, and that having taken place I fail to see any such vice in the manner in which the transaction was closed up as would invalidate these bonds.

3. I pass now to a consideration of the third defense above outlined, the execution of a second set of bonds with which the first (outside of bond number one) was replaced. It seems to me a somewhat narrow and stringent rule to hold that the signing and execution of new bonds, under the circumstances of this case, was a new and independent act upon the part of the officers of the defendant, and that their authority had been so exhausted by the execution and signing of the typewritten bonds that they could not legally execute the latter set. The second set of bonds is in substantially the same form as the typewritten ones. There is no claim that an excessive number has been issued or that any additional obligations have been imposed upon the defendant or that any substantial variation has been made in the terms or obligations of the bond. The facts simply show that the typewritten bonds practically were not marketable and that the new ones were issued in the customary form in order to make them market-

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able. That was the sole object of the change and that was all that was done, and it would seem to me that the officers of the defendant would have the right to do this and execute this second set for the accommodation of the purchaser and that it would not be such a new and independent act as would be lacking in authority, and that their powers were not so exhausted by the signing of the first set as would prevent them from doing it. Assume that after the typewritten bonds had been signed and executed and delivered to the purchaser and while he was still in the room some accident had happened to one of the bonds which so mutilated and destroyed it as to render the bond useless. Would not the officers of the defendant have had the right to sit down and re-execute that bond by giving him another one in the place of the one which had become destroyed. If, however, it be assumed that the defendant is right in its contention that the power of defendant's officers was exhausted by signing and executing typewritten bonds, I still think that the second set of bonds issued in the place of said typewritten ones were valid so far as plaintiff is concerned. I think the reasoning and decision in the case of Town of Solon v. Williamsburgh Savings Bank, 114 N. Y. 122, 137, is decisive of this question in this case, and that in view of the fact that the persons executing the bonds of which plaintiff's is one were in fact the officers and to a certain extent the representatives of the defendant and in view of the fact that the necessary preliminary steps with which to clothe them with the authority to issue said bonds had been taken and in view of the recitals in the bonds and in view of the fact that the plaintiff is a *bona fide* purchaser, the bonds in question should be held good as against this defense. I, of course, do not lose sight of the fact that the case cited was an equity action brought by plaintiff to secure a cancellation of certain bonds. The fact, however, that the decision in that case proceeded very largely upon questions and issues of law rather than principles of equity is emphasized in the succeeding case of Williamsburgh Savings Bank v. Town of Solon, 136 N. Y. 465. And especially upon this question under review, there is nothing in the action of the court in the case first cited to indicate that it was controlled by any principle of equity which would make its decision in that case inapplicable to the disposition of similar facts appearing in an action at law like the one at bar.

It is somewhat urged in connection with this defense that the

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original typewritten bonds are in the possession of the school society which sold the schoolhouse, and that there ought not to be a recovery in this action to which that society is not a party with these bonds outstanding. I have already referred somewhat to the facts upon this point and I am not able to regard these original bonds as outstanding or in the slightest degree in any position to menace this defendant. For several years nothing whatever has been heard from them in the way of a claim. As appears by their production upon the trial of this case they are so mutilated and cancelled that nobody could possibly be deceived or misled by them. Many of them are by their terms past due. After they were so cancelled and mutilated they were delivered and surrendered to Alfred Dolge, the president of this defendant, and there is, in my judgment, no possibility of any one ever resorting to them as a claim against the defendant.

In accordance with these views, judgment is ordered for the plaintiff, with costs.

Judgment for plaintiff, with costs.

Matter of the Application of the ARMORY BOARD, ETC., Relative to Acquiring Title by the City of New York to Certain Lands on Lexington Avenue, Twenty-fifth and Twenty-sixth Streets, as a Site for Armory Purposes, in Pursuance of Chapter 212, Laws of 1898.

(Supreme Court, New York Special Term, July, 1901.)

New York city — Time of filing objections to report of commissioners of estimate — "Plottage" defined and considered — Amount of award — When it may be made to unknown owners.

Sundays must be included in computing the ten days, after the first publication of the notice of the deposit of the report of commissioners of estimate of the city of New York, within which objections thereto must be filed under L. 1897, ch. 378, § 1440.

The added value which an entire plot has, as against the aggregate value of the several lots which compose it, is known as "plottage".

In estimating "plottage", the fact that existing improvements may have to be destroyed by the owner in order to adapt the plot to a new use cannot properly be considered or deducted.

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The amount of an award is in the commissioners' discretion and will not be reviewed unless grossly inadequate or excessive.

Where the commissioners are in doubt as to the title of a lot, their award may be made to unknown owners.

OBJECTIONS filed to report of commissioners.

John Whalen, Corporation Counsel (Charles D. Olendorf, of counsel), for motion.

Bookstaver & Norton (H. W. Bookstaver, of counsel), John C. Shaw, Putney, Twombly & Putney (Henry B. Twombly, of counsel), for property owners, opposed.

BLANCHARD, J. Numerous objections are made by a number of the property owners whose property is affected by the report of the commissioners, all of which have been given consideration. The regularity of these proceedings is attacked because it is claimed that in the notice published pursuant to section 1440 of the Greater New York charter, the requisite time for the filing of objections was not allowed. This objection is, in my opinion, not well taken. The law requires publication of notice of the deposit of the report of the commissioners "for ten days, Sundays and holidays excluded," and provides for the filing of objections to the report "within ten days after the first publication." The first publication occurred June 12, and continued daily to and including the 22d of June, with the exception of June 16, which was Sunday. It is claimed that objections could have been filed until June 24, and that the hearing on the objections, which was set for the 24th, should have been fixed at a subsequent date, because objections could have been filed at any time on that date, and the time of hearing should have been subsequent to the last day of the filing of objections. This contention is predicated upon the exclusion of Sundays in reckoning the "ten days after the first publication." I know of no authority for such a computation of time unless it be expressly so provided by the statute. The statute, however, while it is particular to point out that Sundays should be excluded in the publication of the notice, does not so provide as to the filing of objections. It is to be presumed, therefore, that such was not the intention of the Legislature. I am of

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opinion, however, that the commissioners erred in not making allowance for what is termed "plottage." By that term is meant the added value which a plot has as against the aggregate value of the several lots which compose it. The commissioners, in their report, state they make no allowance for this "because the most liberal allowance on that account which the testimony would warrant would be less than the value of improvements which would necessarily have to be wholly destroyed before an increased value by reason of 'plottage' results." The increased value which accrues to the owner of several adjoining lots composing a plot of land inures to the land irrespective of the buildings thereon. While it may be true that the buildings may have to be destroyed in order that the landowner may avail himself of the plot by increasing its usefulness or appropriateness to the locality, I do not think this a sufficient reason for eliminating this factor of the value of the land. If the value of the land is increased, the owner should be recompensed for this increase. The value of the buildings to be added to the value of the land is not necessarily affected thereby, for the reason that the value of the buildings, if destroyed, would be considered an element in the cost of the improvement, which would supersede the old structures on the land. I cannot see why the property-owner should lose this element of increase in the value of the land simply because the existing structures may prove unsatisfactory to a new purpose to which the land may be put. The property-owner should receive the market value of the entire tract which he owns, if that market value be in excess of the aggregate values of the individual lots. I cannot say that the commissioners have adopted any erroneous theories in fixing the awards other than those pointed out. It may be, as the counsel for the property-owners contend, that the commissioners have placed an extremely low valuation on the property. This, however, is a matter of opinion, of which they are the sole and exclusive judges, unless it is clearly apparent that the awards are either grossly inadequate or excessive. Matter of Brook Ave., 8 App. Div. 294, and cases there cited. I cannot say that such is the case here, and, if the element of "plottage" is considered, the awards may approximate nearer the values claimed by the objecting property-owners. Relative to the award to unknown owners I think the commissioners were amply justified in making the award in that form, where, as here, according to their explana-

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tion, they were in doubt on a question of the title to one of the lots. Greater New York Charter, § 1438; Matter of Fulton Ave., N. Y. L. J., June 15, 1897; Matter of Dept. of Pub. Works, 53 Hun, 280, 297. The proceedings should be remitted to the commissioners for the purpose of reconsidering the awards affected by the question of "plottage," either upon the evidence heretofore taken or upon additional evidence, as they may deem advisable.

Proceedings remitted to commissioners.

CELESTA MOLL, Plaintiff, *v.* JOHN McKEON et al., Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Foreclosure — Rent as between a mortgagee to whom rents had been assigned on default in interest and a lessee who had paid rent in advance, with notice of the mortgage.

Where default is made in the payment of the interest on a recorded mortgage, in process of foreclosure, providing that upon default in interest the rents are assigned to the mortgagee, a lessee of the premises, who became such after the default and who paid his rent in advance, cannot enjoin a receiver of the premises from collecting rent accruing during the period for which the lessee has paid, as the lessee is charged with notice of the rights of the mortgagee.

MOTION for an injunction.

C. S. Houghton, for receiver.

Ralph Nathan, for lessee Lena Vogel.

BLANCHARD, J. The mortgage under foreclosure was made and recorded long prior to the making of the alleged lease with Lena Vogel, under which the said Vogel claims the rents of the premises under foreclosure. The lease is dated May 15, 1901, and is for the term of one year from June 1, 1901. The check for the rent in advance for the months of June, July, August and September, 1901, is dated May 20, 1901. It appears from the amended complaint herein that the default in the payment of in-

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terest occurred on or about April 27, 1901. The mortgage, which was recorded October 27, 1898, contains a clause providing that upon default in the payment of interest the rents of the premises are thenceforth assigned to the mortgagee. The mortgage being of record, the lessee must be held charged with notice of the terms of the mortgage and of the clause therein just referred to. The default in the payment of interest having occurred prior to the alleged lease, the right of the alleged lessee must yield to that of the plaintiff. The alleged lessee having, therefore, no right to the rents, it follows that the motion of the receiver to enjoin her from interfering with him in the collection of the rent is granted, with ten dollars costs.

Motion granted, with ten dollars costs.

JEROME YATES, as Sole Trustee of the Unexecuted Trust Created by the Will of MARGARET LINTZ, Deceased, Plaintiff, *v.* WILLIAM M. THOMAS and JOHN E. CRONLY, Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Sureties of a defaulting non-resident trustee, when liable without her accounting — Termination of trust — Payment over of fund not presumed — Admissions of trustee — Code C. P., § 2818.

Under a testamentary trust of one-quarter of a residuary estate for the benefit of one for life, with directions to divide, after his death, this quarter in the same proportions and among the same persons as the testatrix directed in the case of the other three-quarters, a non-resident remainderman was duly appointed trustee and decreed entitled to receive the fund. She was ordered to account after the death in 1894 of the beneficiary, was removed for neglecting to do so, a successor was appointed and the trustee never thereafter came within this jurisdiction or had any property in it. No decree was ever entered against the trustee establishing her liability or that of the sureties upon her bond.

Held, that, under the exceptional circumstances, the substituted trustee might maintain an action against the sureties to recover so much of the fund as did not belong to the remainderman, although there had never been an accounting or decree.

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That the death of the beneficiary, in 1894, did not terminate the trust, as it required the division, after his death, of the *corpus*; and that, therefore, the appointment of the substituted trustee was legal.

That the plaintiff need not show affirmatively that the trustee had never paid over the fund, as the presumption was that she had not paid it over and still had it.

That an admission of the trustee, that she had received the fund, made before her removal and while she was still trustee of a trust not wholly executed, was competent against her.

ACTION by a substituted trustee appointed by the surrogate against the sureties on Mrs. Cronly's bond "to ascertain and determine the amount due to said trust estate, from said Mary Emma Cronly, late trustee, and that when said amount shall be so determined the defendants may be adjudged to pay the same to plaintiff, for the benefit of said trust estate."

Frank B. Colton, for plaintiff.

Deyo, Duer & Bauerdorf, for defendant Thomas.

No appearance for defendant Cronly.

CLARKE, J. One Margaret Lintz, by her last will and testament, bequeathed one-fourth of her residuary estate to her executors in trust to invest the same and keep it invested at interest on such security as they should deem prudent and safe, to collect the income and apply it to the use of John Stickler Lintz during his life, and, upon and after his death, to pay and divide said "equal fourth part or share of the proceeds of my estate to and among the same persons and in the same proportions as I have hereinafter directed with respect to the remaining three-fourth parts or shares thereof."

On May 7, 1885, Mary Emma Cronly was appointed by the surrogate of New York county sole trustee under said will, with full power to execute and perform all the duties as trustee thereunder, and was directed to file a bond, with two sureties, in $5,000. On the same date, the said Mary Emma Cronly, as principal, and William M. Thomas and John E. Cronly, as sureties, executed and acknowledged their joint and several bond to the People of the State of New York, in the sum of $5,000, conditioned "that if

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the above bounden Mary Emma Cronly shall faithfully discharge the trust reposed in her under the will of Margaret Lintz, deceased, as Trustee for John S. Lintz, and obey all lawful decrees and orders of the Surrogate's Court of the County of New York, or any other Court of jurisdiction, touching the administration of the trust fund committed to her, then this obligation to be void, otherwise to remain in full force and virtue." This bond was duly approved and filed May 8, 1885.

By a decree of the Surrogate's Court of May 8, 1885, on the accounting by Elizabeth A. Lintz, administratrix of said Margaret Lintz, it was ordered "that said administratrix pay to Mary Emma Cronly, the Trustee duly appointed by the Surrogate of New York County, under the Last Will and Testament of said Margaret Lintz under an order made and entered by said Surrogate on May 7th, 1885, the sum of $5,000, in full for the share or portion set apart under the last Will and Testament of said Margaret Lintz for the benefit of said John S. Lintz during his life time."

John Stickler Lintz, the annuitant, died in March, 1894.

On February 23, 1895, an order of the surrogate was made and filed, upon petition, citation, proof of service without the State, and appearance, directing that "Mary Emma Cronly who was appointed to execute the trust created by the last will and testament of Margaret Lintz, deceased, render and file an account of her proceedings as such testamentary trustee on or before Thursday, Feb. 28th, 1895, at 10.30 o'clock A. M. at the said Surrogate's Court in the County Court House in the City of New York." She did not obey said order and has never filed any account.

On January 21, 1896, an order was made and filed, by the surrogate, upon petition, citation and notice of appearance, removing said Mary Emma Cronly from her said trust, revoking her letters and directing her to at once deposit in court the property and funds of the trust remaining unadministered by her.

On December 5, 1900, an order was duly made by the surrogate appointing Jerome Yates, sole trustee of the unexecuted trust created by said will, as successor to Mary Emma Cronly.

For some time prior to January 1, 1894, and ever since, Mrs. Cronly has been continuously with her husband, John E. Cronly, a resident of East Orange, N. J.

Unsuccessful attempts have been made during that time, on

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behalf of parties interested in the trust estate, to find her in this State to serve papers on her here, and also to discover property belonging to her located in New York.

This is an action brought by the substituted trustee appointed by the surrogate against the sureties on Mrs. Cronly's bond "to ascertain and determine the amount due to said trust estate, from said Mary Emma Cronly, late trustee, and that when said amount shall be so determined the defendants may be adjudged to pay the same to plaintiff, for the benefit of said trust estate."

Defendant Cronly is in default and defendant Thomas alone defends.

Trusts of personal property may be created for any lawful purpose, and are not, in respect either of the mode or purpose of their creation, within the statute of uses and trusts. Matter of Carpenter, 131 N. Y. 86. The legal title will remain in the trustee until the purposes of the trust are accomplished, and until the possession of the property is in some way transferred to the person entitled to the use. Perry, Trusts, § 311.

The claim by defendant, as made in the case at bar, is that, inasmuch as the annuitant died in 1894, the trust then and there ceased and determined, and that, as the remaindermen were then entitled to an immediate delivery of the corpus, there was no unexecuted trust over which the surrogate had jurisdiction, and for which he could appoint a trustee.

That the trustee so appointed has no capacity to sue in this action, the remedy, if any, being by suit by the persons entitled to the *corpus* of the estate on the death of the annuitant. But, under the terms of the will creating the trust, it was not only to pay over the income during his life to the beneficiary named, but also "upon and after his death to pay and divide the said equal fourth part or share among the same persons and in the same proportions as thereinafter directed with respect to the other three parts or shares"; as this provision has not been complied with, the trust is still unexecuted, and the surrogate had power, therefore, under section 2818 of the Code of Civil Procedure, to appoint plaintiff as successor to Mary Emma Cronly, the removed testamentary trustee. "When a sole testamentary trustee * * * is by a decree of the surrogate's court removed, * * * and the trust has not been fully executed, the same court may appoint his successor." The serious point, as contended for by de-

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fendant, is that the entry of a decree against the trustee for a fixed sum, and execution issued thereon and returned wholly or partly unsatisfied, are conditions precedent to an action on the bond by a party in interest. The general rule is, indeed, well settled that the sureties upon the bond of an executor or administrator are not liable until the default of their principal has been established before the surrogate. But the answer to that proposition, in the case at bar, is twofold. First, the default of the principal before the surrogate has been judicially established. The condition of the bond was, among other things, that the principal should obey all lawful decrees and orders of the Surrogate's Court touching the administration of the trust fund committed to her. In appropriate proceedings, she was ordered to file a final account. She refused and neglected so to do. For the disobedience of this order she was removed from office. So that her default has been established. Second, as stated by Mr. Justice Barrett, in Bischoff v. Engel, 10 App. Div. 243, "Exceptional circumstances may exist sufficient to warrant the interposition of a court of equity (without the prior establishment of this default), and to secure there the establishment of such default with, as a sequence, an appropriate judgment against the sureties."

In the case at bar, the removed testamentary trustee has for years resided without the jurisdiction of this State; she has refused to obey the orders of the Surrogate's Court which appointed her. She cannot be served with any process within this State, and has no property here. She has refused to account, and for such refusal has been removed. If this court has no power in the premises, it would seem as if the people entitled to the ultimate enjoyment of this trust estate were remediless. The testamentary trustee only obtained possession of the property by virtue of the order of our Surrogate's Court, and the giving of the bond in suit. Having obtained the order, given the bond and received the money, she goes to a foreign jurisdiction, remains there, appropriates the fund to her own use and declines to account. It does not seem to me that, because an accounting cannot be had, and an execution is not issued against this non-resident, the bondsman, whose act in going on the bond made possible this disposition of the fund, should be relieved of liability. Upon the authority of Bischoff v. Engel, 10 App. Div. 240; Scharmann v. Shoell, 23 id. 398; Otto v. Van Riper, 31 id. 278; affd. in 164 N. Y. 536, I am

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constrained to hold that the exceptional circumstances exist in this case which do away with the necessity for a final accounting and a decree thereon in the Surrogate's Court. The cases cited were none of them cases involving testamentary trustees. Defendant claims that, inasmuch as section 2607 of the Code includes executors, administrators, testamentary trustees and guardians, while section 2608, where authority is given to the successor to prosecute the official bond, does not enumerate testamentary trustees; therefore, section 2607 is the only provision applying, and that the issuance and return of an execution from the Surrogate's Court is a condition precedent to the right of action. I cannot so construe the statute. The sections are all in article 5: "Provisions relating generally to letters; and generally to executors, administrators, guardians, and testamentary trustees." The sections follow each other, and have to do with the same subject-matter, and the reasons for the provision in the one case are the same as in the other. I have no doubt but that when a testamentary trustee has been appointed upon giving a bond, and has been removed and his successor appointed, that that successor may sue precisely as if he had been an administrator or guardian, else what is the purpose of the bond?

It is also contended by the defendant that no proof has been made that the removed trustee has not paid over the trust estate to the substituted trustee or the remaindermen.

The money being in her hands, it was her duty to pay it over. The presumption is she did not, and to escape liability that presumption should be rebutted by proof that she did. The general rule is that the party indebted must seek the creditor. Dayton v. Johnson, 69 N. Y. 426.

It appears that the removed testamentary trustee received $5,000 as the trust estate, and, as she was authorized only to pay the income thereof to the annuitant during his life, it must be presumed, in the absence of any accounting, that she is chargeable with the full amount, with interest thereon from the death of the annuitant. But it also appears in evidence that she was one of the four remaindermen, and, therefore, entitled to one-fourth of said sum, amounting to $1,250, leaving the amount payable by the defendants $3,750. Judgment ought, therefore, to be allowed for said amount, with interest, said sum not to exceed the penalty of the bond.

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Certain questions as to the admission of evidence were reserved upon the trial. The motion to strike out the witness Colton's testimony as to the admission made by Mrs. Cronly to him, of the receipt of the fund of $5,000, is denied, as said admission was made before her removal, and while she was still the trustee of an unexecuted trust.

The motion to strike out the testimony of the same witness in regard to statements made by John E. Cronly is granted.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* JOHN J. SCANNELL, Fire Commissioner of the City of New York, and WILLIAM L. MARKS, Defendants.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* JOHN J. SCANNELL, Fire Commissioner, etc., Defendant.

(Supreme Court, New York Special Term, July, 1901.)

Crimes — Removal of indictment to Supreme Court from General Sessions of New York — Code Crim. Pro., §§ 344, 966.

Indictments may as matter of right be removed into the Supreme Court from the Court of General Sessions of the Peace in and for the city and county of New York, for good cause shown.

Where the indictments charged the fire commissioner of said city individually with felonies and misdemeanors affecting his official conduct and also with conspiracy, with another defendant, to defraud the city in the matter of bids for fire department work, and the commissioner alleged that he had acted in all the transactions on the legal advice of the corporation counsel, and it was apparent that important questions of law would be involved in the defense, the Supreme Court removed the indictments to itself, stating at the same time that such removal did not and could not cast any reflection upon the Court of General Sessions.

MOTIONS to remove indictments into the Supreme Court for trial.

Myers, Goldsmith & Bronner, for motions.

Eugene A. Philbin, District Attorney, opposed.

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McAdam, J. On June 28, 1901, two indictments were found by the grand jury of the Court of General Sessions against the defendant John J. Scannell, charging him with certain felonies and misdemeanors affecting his official conduct as the fire commissioner of the city of New York. Simultaneously therewith, the grand jury indicted the said Scannell and William L. Marks for conspiracy, the indictment charging that, as the result of such conspiracy, Marks was, at the expense of the city, to be favored in the awarding of bids for fire department work. This last indictment covers ninety-one typewritten pages. It is needless to say that the cases are important ones, not only to the People of the State, but to the defendant Scannell, who, if convicted, must not only suffer imprisonment, but lose his office, and be forever disqualified from holding any other office. The defendants apply to remove the trial from the Court of General Sessions to this court because of the character of the cases, the high public position of the official, the publicity and notoriety already given and incident to the charges, and because grave and difficult legal questions are involved that ought to be passed upon in the first instance by the Supreme Court. Another circumstance that gives importance to the trial is that the defendant Scannell claims to have acted in all the transactions which are called in question by the advice of the law officer of the city government, to whom he was required to appeal in all cases in which he needed advice affecting his duties. Various difficult questions of law will arise in regard to Scannell's duties in awarding contracts on behalf of the fire department, and as to the extent to which said defendant is protected by the advice of the corporation counsel. The voluminous papers presented for and against the application conclusively demonstrate the gravity of the charges and the importance of the legal questions involved. The application is clearly brought within the authorities which hold that, under such circumstances, good cause for the removal of the indictments into this court exists. See People v. Sessions, 10 Abb. N. C. 192; People v. Rourke, 11 id. 89; People v. Squire, 1 N. Y. St. Repr. 534; People v. Clark, 15 N. Y. Supp. 79. The power of removal is unquestionable. Code Crim. Pro., §§ 344, 966. Upon the argument, the learned district attorney suggested that the granting of the application would be a reflection upon the judges of the Court of General Sessions. Such a suggestion has never been made before, although the power has been exer-

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cised for many years; nor has the removal of a cause from an inferior court into this court ever been so regarded. It is common practice to remove cases from the Supreme Court into the United States courts, and from the municipal courts into the City Court, and such removals have never been regarded as reflections upon the justices of the courts from which the removals were made. Nor have removals on certiorari or appeal been considered as undignified to the inferior tribunal, no matter what result followed. The fact that the statute gives a right of removal for good cause shown entitles a party in a proper case to such removal, and if there is any reflection it is one of legislative origin. The district attorney is fearful of the delay that may result from a removal. There is no ground for such fear. The Appellate Division has already assigned Mr. Justice Fursman, one of the ablest criminal judges in this State, to hold Supreme Court, Part I, during September next (see N. Y. L. J., July 11, 1901), and if, in the opinion of the district attorney, the public interests require that an earlier date be set for trial, the Appellate Division or the Governor, upon the mere suggestion of the district attorney, may assign a justice for the immediate trial of the indictments. As the cases are clearly within the rules laid down by the authorities before cited, the applications will be granted.

Applications granted.

WALDO GRANT MORSE, as Executor, Etc., of RUBY TILDEN PAINE, Deceased, Plaintiff, *v.* SAMUEL J. TILDEN, JR., et al., Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Will — Setting apart fund to produce a fixed income — Disposition of excess — Devise, when not cut down — Abatement of general legacies — Legatee forfeits legacy by testifying to the factum of the will.

Where a will directs executors to set apart and invest so much of the testatrix' estate as will produce an annuity of ten thousand dollars to her husband, the determination of the amount necessary to be set apart is in the discretion of the executors, and the court should not interfere.

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If there is an excess of income, it should be distributed among unpaid legatees of the will.

Where a testatrix, who owned a family plot, a pew and a homestead, as well as certain real estate, after specifically devising the proceeds of her real estate to her brothers and sisters, devised all her "other" real estate to her executors in trust "for the execution of my will", with power of sale, the court considered that the first devise was not cut down, that the subsequent one related only to the plot, pew and homestead, and, further, that the proceeds of the latter were not thereby made applicable to the payment of the general legacies but would go to the brothers and sisters.

Where the personalty is insufficient general legacies abate ratably.

A subscribing witness forfeits his legacy under a will where he testifies to its execution.

ACTION brought for the construction of the will of Ruby Tilden Paine.

Frank Cochrane (L. L. Delafield, of counsel), for plaintiff.

Edw. G. Whitaker, for defendants George H. and Augusta Tilden.

Geo. L. Shearer, for E. T. Sabin and C. D. Sabin, and also guardian *ad litem*.

Emil Goldmark, guardian *ad litem* for infant defendants G. A., A. M. and H. A. Tilden.

George E. Coney, for defendant The Atlanta University.

Rollins & Rollins, for defendant Susan T. Sabin.

J. J. Rollins, for defendants S. T. Sabin and C. B. Whittlesey.

E. P. Wheeler, for Lebanon Society.

W. H. Stryker, defendant, in person.

A. S. Hutchins, for W. S. Paine.

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Cady & Delamater, for The National Hudson River Bank.

Lemuel Skidmore, for defendant The Methodist Episcopal Society for Foreign Missions.

Wm. T. Schley, for Henrietta T. Blatchford.

O'GORMAN, J. Under the second clause of the will, it is quite clear that it is the duty of the executors to set apart and invest so much of the estate as will provide a net annual income of $10,000, the annuity intended for decedent's husband. The lien of the annuity will affect only the particular fund set apart for that purpose, and the determination of the amount of the fund must be left to the trustees. Their decision involves the exercise of a discretion confided to them by the decedent, and should not be interfered with by the court. The annuity is to be paid out of the income, although the trustees may resort to the *corpus* of the fund to supply a deficiency when necessary. Should the fund produce an income in excess of the annuity, the surplus must be distributed among the legatees to the extent that their legacies remain unpaid. It will form part of the residuum only in the event of all other legacies having been previously discharged. By the sixth clause the testatrix expressly gave the proceeds of her real estate to her brothers and sisters. This bequest was not impaired or diminished by the succeeding paragraph, which reads: "Seventh. I give and devise all my other real estate to my executors in trust for the execution of my will, with power to sell and dispose of the same at public or private sale." The first and sixth clauses deal with the family plot at New Lebanon, the pew in the Madison Square Presbyterian church and the homestead at New Lebanon, and the specific devises of these minor interests explain the words "other real estate" in the seventh paragraph. It was evidently the intention of the testatrix that the executors should have the power to sell the real estate not specifically devised and distribute the proceeds as directed by the last paragraph of the immediately preceding clause. The provisions of paragraphs 6 and 7 touching the real estate are not inharmonious, and the words "in trust for the execution of my will" do not support the contention that these proceeds are applicable, with the personal estate, to the payment of general legacies. The executors are to sell the

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real estate and receive the proceeds "in trust for the execution of my will"; that is, with the proceeds they are to carry out and execute the provisions of the will, and one of these provisions contains the specific direction to pay those particular proceeds to the brothers and sisters of the testatrix, and compliance herewith is mandatory upon the executors. As it appears, the personalty will be insufficient, after the creation of the annuity fund, to pay at this time the legacies given by the first, third, fourth and fifth clauses, these legacies must abate ratably as between themselves. They are general legacies, and there is nothing in the language of the will or the character of the bequests to indicate an intention to prefer a particular legatee. The payment of the legacies mentioned in the first, second and third paragraphs of clause 6 must be postponed until all the prior legacies are paid; and as to these legacies interest will not run until the executors have in their hands sufficient money to pay the legacies. The legacy to the Congregational church is a general legacy, and carries interest from the expiration of one year after the granting of letters. The legatees mentioned in the third and fifth clauses are entitled to receive such income as has actually been earned by the respective funds since the death of the testatrix. Matter of Stanfield, 135 N. Y. 292. This may be ascertained by subtracting from the total net income the total annuity and dividing the balance among the several trust funds in the proportion which each fund bore to the whole estate at the death of testatrix, after deducting therefrom the principal of the annuity fund. The will was proved by the testimony of Emily R. Tilden and H. Tilden Swan, two of the subscribing witnesses, and they, therefore, forfeit their legacies. As the other subscribing witness, Susan T. Sabin, was not examined, her rights as legatee are not affected. Her presence could not be secured on the probate, and consequently the will could not be proved without the testimony of the witnesses who were examined.

Judgment accordingly.

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JOHN R. McLAGGAN, Plaintiff, *v.* ELI SMITH and LAVINA SMITH, Defendants.

(Supreme Court, Onondaga Special Term, July, 1901.)

Creditor's action, based on the costs of a former similar action — Execution — False return must be pleaded.

A creditor of the son of the defendant Eli Smith, aged seventy years, brought an action to set aside, as fraudulent as to creditors, a deed from the son to the father, and during the trial the father, in order to avoid payment of any judgment which might then be recovered, conveyed some land of little value, constituting, however, all his property, to his wife, the defendant Lavina Smith, reserving to himself a life estate therein. The creditor succeeded in that action and, among other things, recovered against Eli Smith personally a deficiency judgment for the costs and disbursements, upon which execution was issued and returned unsatisfied. Upon the basis of that judgment the creditor then brought this action, and alleged that the transfer from Eli to Lavina was fraudulent as to creditors.

Held, that the action was maintainable although its only basis was the costs and disbursements of the former action in equity — which had not ripened into a liability at the time of the transfer from Eli to Lavina but subsequently became a debt.

Semble, that it was not necessary for the creditor first to sell the life interest of Eli in the land, as that interest appeared to be worth only a few dollars, and further, that if the sheriff's return, of no property, was untrue that fact should have been pleaded as a defense.

ACTION in the nature of a creditor's bill to set aside a deed from the defendant Eli Smith to the defendant Lavina Smith, executed on or about July 18, 1900, of a small piece of land situate in the Town of Cicero, Onondaga county, N. Y., of the value of from $400 to $700, and subject to a mortgage of $150. The conveyance reserved to the defendant Eli, who is a man about seventy years of age, a life estate in said property.

Kelly & Rill, for plaintiff.

C. H. Lewis, for defendants.

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HISCOCK, J. In addition to the facts above stated, it appeared upon the trial that, on or about June 21, 1898, a son of the defendant Eli Smith made a conveyance to his father of thirteen acres of land situated in the town of Cicero, and then left the State for Michigan; that said son left unpaid several hundred dollars of indebtedness existing at the time when he made said conveyance, and that thereafter an action was brought by the plaintiff to have said transfer from the son to the father set aside as fraudulent and void as to him and other creditors. Plaintiff succeeded in said action, and a judgment was duly entered on or about October 31, 1900, which vacated and set aside said deed, and also provided as follows: "That the plaintiff * * * recover of the defendants the sum of $747, and the sum of $224.97 costs and disbursements of the action, * * * which sum is hereby declared to be a lien upon the lands embraced in said deed of conveyance. * * * That said land, or so much thereof as may be necessary for that purpose, be sold by the Sheriff of the County of Onondaga to satisfy said lien in like manner as upon a sale on execution; that out of the net proceeds of such sale the said Sheriff pay to the plaintiff, or to his attorneys, the sum so adjudged to the plaintiff as aforesaid, with interest thereon to the time of such payment; that if there be any surplus remaining after such payment, the said Sheriff pay the same to the defendant Eli Smith, or his attorneys, and that the sum of $747 damages adjudged to the plaintiff as aforesaid in this action shall not be recoverable from said Eli Smith or other defendants otherwise than from said real estate, but that the plaintiff recover of said defendant, Eli Smith, personally the residue of said sum adjudged to the plaintiff for costs and disbursements of the action, to wit, the sum of $224.97, in case the proceeds of the said sale shall be insufficient to satisfy the whole sum found due to the plaintiff as aforesaid."

Thereafter the property covered by said deed so set aside as fraudulent as aforesaid, was sold in accordance with said judgment for the sum of $400, which was insufficient to pay the creditors' claims involved in the action aforesaid, and, of course, insufficient to pay the judgment for costs of $224.97, and thereupon, in said action, as the result of said sale, a judgment as for a deficiency was entered against the defendant Eli Smith in said action on or about January 7, 1901, for said costs, $224.97, and interest

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and disbursements in addition, making in all the sum of $277.21, and thereafter, and on said 7th. day of January, 1901, an execution was issued against said Smith which, thereafter and before the commencement of this action, was returned unsatisfied; whereupon this action was brought upon said last-mentioned judgment to set aside the transfer from the husband to the wife, defendants herein.

I have referred to the proceedings at length which led up to the judgment in question, because they are somewhat out of the ordinary course, and because they are made the subject of criticism by defendants' counsel.

While the action brought by plaintiff against the defendant Eli Smith to set aside the transfer by the son was still pending, and after it had been in part tried, the deed in question herein was executed to the defendant wife. I have no doubt upon the evidence, and from all the surrounding circumstances, that it was executed for the purpose of avoiding payment and collection of any judgment for costs or otherwise which plaintiff might secure against the defendant Eli Smith in the action then pending to set aside the transfer by the son. The transfer stripped the defendant Eli of all his property. The only consideration for it was an alleged agreement made between him and the defendant Lavina before their marriage, which had occurred a short time prior, that if she would marry him he would execute to her a transfer of the land in question here, or of the land covered by the son's transfer, and, as I suggested upon the trial, I am inclined to think that there was some talk between the defendant Eli and the defendant Lavina about his making some provision for her if she would marry him. This talk rests entirely upon the evidence of interested parties and their relatives, but, as stated, I am inclined to think there was some talk upon that subject. Concededly, however, there was no written contract or agreement, and there was no performance of the alleged verbal agreement promptly upon the performance of the marriage. In fact, nothing was done to carry out its provisions for several months after the marriage, and until the defendant Eli had become involved in the litigation over his son's deed. It is not argued that this parol ante-nuptial talk was a sufficient consideration for the transfer from the husband to the wife as against creditors. It is claimed, upon the part of the defendants, that if it took place it would be sufficient

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to rebut the presumption of fraud in the conveyance, although the same was voluntary. I am led to believe, however, by all of the circumstances, and especially by the failure to do anything in the way of carrying out said alleged understanding between the parties for so long a time after the marriage, that the motives which prompted the defendants finally to an execution of the conveyance was the fear of losing the property to plaintiff and a desire to prevent such an occurrence; that they were largely actuated by a desire and intent to prevent the plaintiff from imposing upon the property any liability which might accrue in the then pending litigation, and that this fraudulent and improper intent entered into the execution of the conveyance.

It is urged by the defendants that, at the time the conveyance was executed, there was no indebtedness existing in favor of the plaintiff against the defendants, or either of them. A litigation, however, then was and for some time had been pending between plaintiff and the defendant grantor. While costs in an equity suit, as urged by defendants' counsel, are an incident, and do not necessarily follow success, still it was certainly entirely possible that plaintiff might, as he did, recover a judgment for costs. With the commencement of the litigation, the contingent liability existed against the defendant grantor of a judgment for costs, and it is well settled that a grantor may be guilty of fraud in making a conveyance to avoid liabilities ripening thereafter, as well as in making one to escape debts absolutely fixed at the time of the conveyance.

In addition to the defense interposed upon the merits, two technical defenses are called to my attention by defendants' counsel upon the submission of the case.

It is urged that the judgment in the suit brought by plaintiff to set aside the first conveyance by the son is not in accordance with the referee's report and directions for a judgment therein contained. There is no very substantial difference, so far as this action is concerned, between the judgment as entered and the one directed, but it is sufficient to say here that no such defense is presented for consideration. The judgment in said action was entered in October. If it was not in accordance with the referee's report, or was irregular in any respect, the relief for such fault would be found in a motion directed to a reformation of the judgment.

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It is next urged that the grantor, in the conveyance attacked in this action, reserved a life interest in the property in question, and that such life interest could be reached by an ordinary execution sale which was not done. This objection also is not of much practical importance. The entire property involved here, as hereinbefore stated, is of small value. The husband is a man of over seventy years of age, and his life estate, therefore, would not bring upon a sale but a few dollars in all probability. This point, however, is not properly presented by any defense in this action. An execution was issued upon the judgment, upon which this action was based, before the action was started. It was duly returned wholly unsatisfied by the sheriff. If such return was untrue or improper, proceedings should have been instituted directly against the return upon said execution. At least, the defense should have been set up in this action that it was an untrue return.

Findings and judgment may be prepared in behalf of the plaintiff, setting aside said transfer.

Judgment for plaintiff.

JAMES C. FARGO, as President of the American Express Company, Plaintiff, *v.* GEORGE R. PAUL, Defendant.

(Supreme Court, Saratoga Special Term, July, 1901.)

Attorney's lien — Forfeited by his refusal to continue unless paid — Substitution.

An attorney who, after obtaining a verdict for his client which was set aside on appeal, notifies him that he will not go on with the new trial, unless then paid a certain sum for services and disbursements, discharges himself upon the client's neglect to pay; and, therefore, cannot, upon the ground of his lien for costs, prevent the substitution, after a second trial, for the purposes of entering judgment and taxing costs, of another attorney, whom the client subsequently retained and who got him a verdict, with the costs of both trials, which that attorney was to have as his compensation, as the first attorney has no lien on the judgment rendered on the second trial and himself terminated the relation of attorney and client by refusing to go on with the litigation while it was pending.

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MOTION for substitution of attorneys.

J. W. Shea, for motion.

C. A. Kellogg, opposed.

HOUGHTON, J. Upon the first trial, the jury rendered a verdict for the defendant. The trial judge set this verdict aside as against the weight of evidence. An appeal was taken by the defendant to the Appellate Division, and the order setting aside the verdict was sustained. George W. Fuller was attorney for the defendant, and Hon. Charles A. Kellogg had acted as counsel, both upon the trial and upon the appeal. The new trial ordered by the trial judge having been sustained by the Appellate Division, and the defendant's attorney and his counsel having paid out more money than they had received, refused to act upon the second trial unless the defendant should pay something on account. The defendant promised to pay $200, was unable to raise it, or did not do so, and the defendant employed other counsel to try the cause, and the trial resulted in another verdict for the defendant. The costs of the two trials and of the appeal are, therefore, taxable against the plaintiff, and amount to a considerable sum.

The defendant asks that the counsel who conducted the last trial be substituted as attorney in place of Mr. Fuller, for the purpose of entering judgment and taxing the costs. The former attorney for the defendant objects to this and refuses to sign the stipulation. This is a motion for such substitution.

I think it would be just and right that the former attorney and counsel should have a part of the costs to be taxed, and I would make the order conditioned upon that if I had the power so to do; but the former attorney having refused to act in the midst of the litigation, he discharged himself and thereby lost any lien for services which he may have had upon any judgment ultimately obtained. Halbert v. Gibbs, 16 App. Div. 126; Tuck v. Manning, 53 Hun, 455. If there had been a judgment in his client's favor, the position of the attorney might have been different; but, at the time he withdrew from the case, because of the non-payment of money for services and disbursements, there was no judgment in favor of the defendant, and there was simply an action pend-

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ing against him in which he, the defendant, had received a verdict, which was set aside. In order that any judgment should accrue in favor of the defendant, there must be another trial, and he must succeed. That has come to pass. When the defendant made arrangements with counsel who conducted the last trial, the papers show that he entered into an agreement with him that he should have all taxable costs and disbursements in case a judgment, entitling him to take the same, should be obtained.

The cause was tried in May last. In the February preceding, Fuller wrote a letter to the defendant, saying that unless $200 was paid by the 20th of that month, he should notify the attorney upon the other side that the connection of himself as counsel with the case was at an end, and that henceforth papers must be served upon the defendant himself, and the letter would be a notice, as well, that on that day, unless the money was paid, he would drop the case of the defendant. This was such an unqualified withdrawal from the case that it comes squarely within the cases above cited, and I think I am bound to grant the order without condition, and the former attorney must look to his client for such compensation as he may be entitled to.

In the case of Tuck v. Manning, *supra,* the court says: "Assuming, however, that the lien of an attorney would, under ordinary circumstances, attach to the final decision in such proceeding, it cannot now be claimed by him for he refused to do the act which would have rendered a judgment in his client's favor possible, and so waived the right to which he might otherwise have become entitled; and if, for services rendered before judgment, there was an inchoate right of lien, it was lost by his unqualified abandonment of the cause. In other words, he discharged himself, and in such a case it is clear that an attorney cannot leave his client in the middle of a matter, because he does not supply him with money, or by reason of any other difficulty, without running the risk of losing the benefit of that relation."

Of course, the attorney would have no lien upon the judgment which his client might obtain upon the matter in controversy, unless the relation of attorney and client existed.

For the reasons above given, and because I have no discretion in the matter, but am bound by the facts and the law applicable to them, as I view it, the motion is granted substituting J. W.

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Shea as attorney for the defendant, and George W. Fuller is ordered and directed to deliver to said Shea the papers necessary to form the judgment-roll and for the ascertainment of costs, without any provision allowing said Fuller any pay therefor.

Motion granted.

ALEXANDER McKAY, Plaintiff, *v.* HAROLD S. MORRIS et al., Defendants.

(Supreme Court, Saratoga Special Term, July, 1901.)

Attorney's lien — Not enforcible against responsible client's discontinuance of the action.

The lien of an attorney is enforcible for his protection only, and where his client, a plaintiff, is responsible and of his own motion consents to discontinue his action before trial and without costs, the attorney must look to him for compensation and cannot procure the order of discontinuance, even though irregular because not consented to by himself, to be set aside merely because it made no provision for costs.

MOTION by an attorney, in his own behalf, to set aside an order granted on a stipulation, on the ground that it did not provide for his costs.

James F. Swanick, for plaintiff.

Kronfeld & Harris, for defendants.

HOUGHTON, J. The plaintiff brought action against the defendants, through James F. Swanick, his attorney. Subsequently McKay, settled with the defendants, and signed a stipulation discontinuing the action, without costs. The attorney, in his own behalf, makes a motion to set aside the order granted on that stipulation, on the ground that it did not provide for his costs. The action had never been tried, issue having only been joined at the time of the settlement.

While the order discontinuing the action may have been irregular, because the plaintiff's attorney had not signed the same, yet I do not think it can now be set aside on motion of the attorney alone under the facts here existing.

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The attorney had a lien upon the cause of action of his client, but there is no evidence that the release and settlement was in fraud of the attorney, or that the settlement would deprive him of his costs, because his client is entirely responsible. The lien which the law gives the attorney is simply for his protection, and when the courts allow an action to be prosecuted for the purpose of the attorney securing his costs, it is because the client is irresponsible, and there is no other manner in which the attorney can be protected in the lien which he had. Roberts v. Doty, 31 Hun, 128; Quinlan v. Birge, 43 id. 483; Poole v. Belcha, 131 N. Y. 200. No such state of facts are shown by the papers on this motion as requires the intervention of the court to protect the plaintiff's attorney for the services which he may have rendered to the plaintiff, because the plaintiff is responsible, and there is no evidence that the settlement was made collusively for the purpose of defrauding the attorney of his compensation.

The motion must be denied, but, under the circumstances, without costs.

Motion denied, without costs.

Matter of Proving the Last Will and Testament of ELLEN CAMPBELL, Deceased.

(Surrogate's Court, Albany County, July, 1901.)

Will — Codicil as a republication.

A testatrix named Ellen Campbell made a will on July 6, 1897, revoking all former wills and this she specifically revoked by a will made in 1899. On December 7, 1900, she executed a paper, headed "Codicil to the last will and testament of Miss Ellen Campbell, which will bears date July 6, 1897", and this contained no revocation clause whatever.

Held that the will of 1899 was not her last will.

That the codicil amounted to a republication of the will of 1897 and made it speak, as modified by the codicil, as of the date of the codicil.

THIS proceeding was commenced on the 21st day of January, 1901, by the filing of a petition with the surrogate of Albany

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county, for the probate of an instrument bearing date July 6, 1897, and a codicil thereto bearing date December 7, 1900, as the last will and testament of said Ellen Campbell, all the heirs-at-law and next of kin of said deceased having waived the issuance and service of a citation therein.

On the 1st day of February, 1901, an order was granted by the surrogate of Albany county that a citation issue to the Albany Art & Historical Society and the Home for Aged Men, beneficiaries, respectively, under the instrument already named, and another instrument bearing date July 19, 1899.

On April 8, 1901, an order was granted by the Albany county surrogate admitting the instrument of July 6, 1897, and the codicil bearing date December 7, 1900, to probate as the last will and testament of the deceased.

Arthur L. Andrews, for Archibald Campbell and David A. Thompson, executors.

A. Page Smith, for The Home for Aged Men.

William L. Learned, for The Albany Historical & Art Society.

Rosendale & Hessberg, for The Albany Hospital.

Hun, Johnston & Hand, for Charles H. Campbell.

FITTS, S. The testatrix died at the city of Albany, N. Y., on the 11th day of December, 1900. The petitioners herein presented for probate a paper alleged by them to be her last will and testament, bearing date the 6th day of July, 1897, together with a codicil thereto executed on the 7th day of December, 1900, four days before her death. After taking the depositions of the subscribing witnesses to the paper executed in 1897 and the codicil thereto, and before the entry of the decree admitting the will to probate, the petitioners filed in this court another paper purporting to have been executed by the testatrix on the 19th day of July, 1899, by the express terms of which she assumed to devise and bequeath all of her estate, and to revoke all previous wills by her made. A supplemental citation was thereupon issued to all parties in interest, and the depositions of the subscribing wit-

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nesses to said instrument were taken. The matter for me, now, to determine is, which is the last will and testament of said deceased. The estate involved aggregates about $135,000. I find that, at the time of the execution of these different instruments, they were executed with all the formalities prescribed by law, and that, at the time of the execution of each, the testatrix had sufficient testamentary capacity, and was not under any undue influence. The different instruments are all in the handwriting of Mr. David A. Thompson, of the firm of Thompson & Andrews. It appears, from the testimony, that, on the 7th day of December, 1900, at the request of Miss Campbell, Mr. Thompson called at her residence, and was there informed that she desired to make some alterations to her will; he then requested its production; she thereupon asked Miss Henderson, who was performing the duties of a nurse, she then being ill, to produce a certain bag, and from that bag she obtained the will executed by her in 1897, and handed it to Mr. Thompson. Mr. Thompson then read to her the provisions of the will, and she made such suggestions as to alterations and changes as she desired to be made, he making a memorandum of the same upon the back of the will. The paper now offered as a codicil to the will was then drawn, embodying and carrying into effect her desires with reference to the disposition of her property, and such alterations and modifications as she wished to have made to her former will, and the same was thereupon executed with all the formalities required by law. The paper, as to its heading, is as follows:

"Codicil to the last will and testament of Miss Ellen Campbell, which will bears date July 6, 1897."

By the first item of her codicil, she authorizes the Albany Hospital to use the sum of $50,000 theretofore bequeathed to it in any way to secure the maintenance of a separate ward in said hospital for the treatment of cripples, and revoked the provision for the erection of a separate and suitable building contained in her former will. By the second item of the codicil, she revoked the sixth clause thereof with reference to the erection of a monument to the memory of Sir Walter Scott, and then proceeded to make a number of pecuniary bequests to her relatives and friends. The will executed in 1899, by its provisions, revokes the will of 1897; the will of 1897 also contains a clause revoking all existing wills, but there is no revocation clause in the codicil. By the

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will of 1897, The Albany Historical & Art Society was bequeathed the sum of $5,000, and, in addition thereto, certain curios and valuable books; by the will of 1899, the pecuniary bequest to said society was revoked, and by said will the testatrix bequeathed to the Home for Aged Men the sum of $5,000, which bequest was not contained in the will of 1897 or the codicil thereto. The counsel for the Home for Aged Men contends that the will executed by the testatrix in 1899 is her last will and testament, while the counsel for the Albany Historical & Art Society contends that the will of 1897 and the codicil thereto, taken together, represents and constitutes the last will and testament of said deceased. The statutes of the State govern and determine the manner in which wills may be revoked, and are found in 2 Revised Statutes (64, § 42), and are as follows: "No will in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise than by some other will in writing or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence by his direction and consent; and when so done by another person, the direction and consent of the testator, and the act of such injury or destruction, shall be proved by at least two witnesses."

The will of 1897 was revoked by the will of 1899, and the question now to be considered is whether the execution of the codicil to the will of 1897 revives it and makes it speak as of the date of the publication of the codicil of December 7, 1900. I have reached the conclusion that the rule of law determining this matter is set forth in the case of Brown v. Clark, 77 N. Y. 369. In that case the testatrix, while unmarried, executed a will, and after her marriage executed a codicil to it, and by its terms reaffirmed the will, and the court there held that the codicil, having been executed with all the formalities required by statute for the execution of a will, operated as a republication of the will to which it referred so far as not changed by the codicil. And, in commenting upon it, at page 376, the court says: "Upon the authorities cited, it is clear that under the law in this State as it stood prior to 1830, here was a valid republication of the

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will in question by the execution of the codicil of December 7, 1876. The Revised Statutes changed in several respects the ceremonies to be observed in execution of wills, and among other things it is expressly required that the testator shall at the time of making or acknowledging his subscription to the will, declare the instrument to be his last will and testament. (2 Rev. Stat. 63, § 40, subd. 3.) There is nothing in this statute indicating that it was intended to change the rule that a codicil duly executed was a republication of the will. The codicil in the case of Van Cortlandt v. Kip (1 Hill, 590) was executed after the present statute was enacted. It referred to the will executed in 1824, but did not in terms republish it, and made no reference to the lands acquired by the testator after the will was made, but the court held, in accordance with the law which existed before the Revised Statutes were passed, that the codicil was a republication of the devise in the will, and that the after-acquired lands passed to the surviving devisee. The Revised Statutes did not affect the construction of wills made before the chapter relating to wills took effect. (2 Rev. Stat. 68, § 75.)"

And the court, further commenting upon the case in Van Cortlandt v. Kip, says: "This case seems to be a direct authority that the due execution and publication of a codicil is, under the Revised Statutes as it was prior thereto, a republication of the will to which it refers. The codicil in this case refers to the will and expressly adopts and reaffirms it. The testatrix by publishing the codicil, published the will, which was clearly identified by the reference in the codicil and the extrinsic proof. It is established by a long line of authorities that any written testamentary document in existence at the execution of a will may, by reference, be incorporated into and become a part of the will, provided the reference in the will is distinct and clearly identifies, or renders capable of identification, by the aid of extrinsic proof, the document to which reference is made."

And again it was held, in Matter of Miller, 11 App. Div. 337, that, "It is a well settled principle that a will and codicil are to be considered together as one instrument; that a codicil duly executed referring to a will is a republication thereof, and the effect of such republication thereof is to bring down the will to the date of the codicil."

Again, in Brown v. Clark, quoting from 1 Jarman, 78, I find

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the following: "'A codicil duly attested communicates the efficacy of its attestation to an unattested will or previous codicil so as to render effectual any devise of a freehold estate which may be continued in such prior unattested instrument.' And further on, speaking of the incorporation of documents by reference in the will, he says that this is permitted, 'without violating the principle of the enactment, which requires an attestation by witnesses, the testator's intention to adopt the contents of such instrument being manifested by a will duly attested.'"

So that, in accordance with the authorities above cited, in my judgment, the will of 1897 and the codicil of 1900 constitute one instrument, and speak of the date of the execution of the codicil on December 7, 1900, and such being the case, and the will of 1897 containing a clause revoking all former wills by her, I hold that its effect is to revoke the will executed in 1899. I have reached a conclusion in this matter contrary to what I anticipated at the time the matter was submitted to me, but, after a close reading of the case of Brown v. Clark, I am unable to arrive at any other result. Findings can, therefore, be prepared declaring that the will of 1897 and the codicil of 1900, referring to the same, is the last will and testament of said deceased, and revoking by its terms the will executed by her in 1899.

Decreed accordingly.

Matter of the Judicial Settlement of the Estate of SIMEON INGRAHAM, Deceased.

(Surrogate's Court, Cattaraugus County, July, 1901.)

Costs — On established disputed claim referred by consent to the surrogate — Code C. P., §§ 1822, 1835, 1836, 2561.

Where a disputed claim against a decedent's estate is referred by consent to the surrogate and is heard by him upon the judicial settlement, costs to the successful claimant are discretionary, their amount must be within the limits prescribed by Code C. P., § 2561, and should be determined upon the principles which govern the allowance or disallowance of costs in actions at law against such estates.

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A claimant, not entitled to be cited as heir at law or next of kin, becomes a party to the proceeding by presenting his claim and filing a consent, but, nevertheless, should not be awarded costs against the estate or its administrator where the latter's resistance of the claim results in the surrogate's reducing it seventy-five per cent.

PROCEEDINGS upon the judicial settlement of the accounts of an administrator.

G. W. Cole and W. G. Laidlaw, for administrator.

J. M. & G. M. Congdon, for claimant Adelia C. Cowdry.

DAVIE, S. About the 21st of April, 1900, the claimant, Adelia C. Cowdry, presented to the administrator a claim against the estate for services alleged to have been rendered by the claimant for the decedent during a period of thirteen years immediately preceding his death, amounting in all in value to the sum of $5,086.88, and admitting credits thereon to the amount of $514, leaving a balance of $4,572.88. This claim was rejected by the administrator by written notice dated April 27, 1900, in the following form:

"*To Mrs. Adelia C. Cowdry:*

"YOU WILL PLEASE TO TAKE NOTICE that the claim presented by you to me as administrator of the estate of Simeon Ingraham, deceased, against the estate of the said Simeon Ingraham, deceased, amounting to the sum of $4,572.88 is hereby wholly disputed and rejected.

"Dated *April 27th,* 1900.

"Yours truly,

ELBERT INGRAHAM,

"*Administrator of the Estate of Simeon Ingraham, Deceased.*"

On the 2d day of May, 1900, the administrator filed with the surrogate a consent that said claim might be heard and determined by the surrogate upon the judicial settlement of the estate, and on the 23d day of October of the same year a similar consent was filed by and on behalf of the claimant, Adelia C. Cowdry.

Proceedings having been instituted for a judicial settlement of the estate, and the administrator's accounts having been filed

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and settled, and the surrogate having heard the proofs and allegations presented on behalf of the respective parties in regard to such personal claim, determined the amount thereof by a decision dated May 31, 1901, and that the claimant was entitled to recover against the estate of decedent for and on account of the services set forth in the claim filed the sum of $1,179.20, and that she was not entitled to recover any farther or greater sum. The question which now arises upon the settlement of the terms of the decree is the one relating to the right of the claimant to recover costs in this proceeding. Her right to recover disbursements is not involved, as the attorneys for the respective parties have stipulated that she should recover her witnesses' fees and disbursements incurred in this proceeding. The only question is as to whether the claimant is entitled to receive out of the funds of the estate any allowance for counsel fees upon this proceeding, and, if so, what amount. I am unable to find any adjudication of this particular question, and the practice has become so common of submitting disputed claims to the determination of the surrogate upon judicial settlement that the question of costs in such proceedings should be determined. The power to award costs in Surrogates' Courts is derived wholly from statutory provisions. Matter of Holden, 126 N. Y. 589; McMahon v. Smith, 20 Misc. Rep. 305, 308; Du Bois v. Brown, 1 Dem. 317.

Hence, it is entirely apparent that costs cannot be awarded to the claimant in this case unless the statute expressly, or by reasonable implication, makes provision for such allowance. This case is not one embraced within the terms of section 2558 of the Code, where costs are to be either allowed or disallowed as a matter of law. There is no express provision in the statute relating to the submission of disputed claims against the estate to the determination of the surrogate for allowance or disallowance of costs; but the determination of the merits of a disputed claim upon judicial settlement becomes, by virtue of the provisions of the statute, an incident to the judicial settlement, and the claimant, upon the filing of the consent provided for in the statute, becomes a party to such proceeding, and the allowance of costs must be determined by the provisions of section 2561 of the Code. In other words, in a case of this kind, the allowance or disallowance of costs is a matter within the discretion of the surrogate, such discretion to be exercised within the limits as to the amount of costs specified

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in the section last cited. In the exercise of this discretion, however, the surrogate should be guided by the principles and decisions relating to the question of costs against estates in case of actions. Section 1835 of the Code provides: "Where a judgment for a sum of money only is rendered against an executor or administrator, in an action brought against him in his representative capacity, costs shall not be awarded against him, except as prescribed in the next section."

The next section, 1836, is as follows: "Where it appears in a case specified in the last section that the plaintiff's demand was presented within the time limited by a notice, published as prescribed by law, requiring creditors to present their claims; and that the payment thereof was unreasonably resisted or neglected, or that the defendant did not file the consent provided in section 1822 at least ten days before the expiration of six months from the rejection thereof, the court may award costs against the executor or administrator, to be collected either out of his individual property or out of the property of the decedent as the court directs, having reference to the facts which appear upon the trial. Where the action is brought in the supreme court, the facts must be certified by the judge or referee before whom the trial took place."

In this case, the claim was presented within the time limited by the notice to creditors, and the administrator, directly after the rejection of the claim, filed with the surrogate his consent as provided in section 1822. This being the case, had an action been brought upon this claim, costs could not have been allowed to the claimant unless the court or referee before whom the same had been tried certified that the payment of the claim had been unreasonably resisted or neglected. In this case, costs should not be allowed to the claimant unless it appears that the payment of the claim was unreasonably resisted or neglected. It is true that, by the phraseology of the notice of rejection, the claim is rejected in its entirety, and no suggestion is made of allowing any portion of the claim; yet it does appear that a very material reduction of the claim resulted from the trial before the surrogate, the claim as presented amounting to $4,572.88, and, as allowed, to the sum of $1,179.20. Under the decisions bearing upon that question, it could not be held that an administrator had unreasonably resisted the payment of the claim where he had succeeded,

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upon the trial, in reducing its amount to less than one-quarter of that claim. The reasons which are operative in determining the right to costs in an action at law against an estate apply equally as well to a claim determined on judicial settlement by the surrogate. The payment of the claim in this case was not unreasonably resisted. The defense resulted in shielding the estate from liability to the extent of several thousands of dollars. Consequently, costs cannot be allowed to the claimant.

As a result of such examination as I have been able to give this question of costs, I come to the following conclusions:

That, in all cases where disputed claims against an estate are submitted to the surrogate for determination on judicial settlement, pursuant to the provisions of section 1822 of the Code, the allowance or disallowance of costs to the claimant is a matter of discretion with the surrogate. Such discretion must be exercised within the limits, as to amount, provided for in section 2561. That, in the exercise of such discretion, the surrogate should be guided and controlled by the same principles which are applicable to the allowance or disallowance of costs in actions at law against estates. That a claimant, not an heir-at-law or next of kin, and for that reason not entitled to citation upon judicial settlement, upon presentation of his claim and filing of the proper consent that the same be heard and determined by the surrogate upon the judicial settlement, becomes a party to the proceeding, and consequently may be allowed costs in a proper case.

Decreed accordingly.

Matter of the Will of JOHN LACY, Deceased.

(Surrogate's Court, New York County, July, 1901.)

Undue influence — Bequest to a nurse — Free access to a testator by objectors to the bequest.

Where the wife of an aged paralytic testator, having a very considerable estate, three days before his death notified his attorney that the testator would like to see him at once and on his arrival left the attorney in the sick room with a nurse whom the testator had long employed, none of the family being present, and the nurse

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woke the testator up and, he being unable to speak, interpreted for him that he wished to increase a legacy he had made in her favor from $1,000 to $8,000, and the testator assented and carefully read over a codicil, then and there made to that effect, before he signed it, and the attorney testified that he considered the testator of sound mind, the court considered that, in the absence of any other evidence of undue influence, the codicil should stand, as its terms were not unjust and no effort was shown to have been made to prevent the persons (the widow and children), who were alleged to have been discriminated against in and by the codicil, from having free access to the testator.

PROCEEDINGS upon the probate of a will and codicil.

Lemuel Skidmore, for petitioner.

Mayer & Gilbert, for Ellen Healy, a legatee.

Ormiston & McCormack, for contestants.

FITZGERALD, S. The decedent died on the 12th of January, 1901, at the age of seventy-four, leaving a widow and children. By his will, executed in November, 1896, and a codicil, executed in 1899, his widow and children receive the bulk of his very considerable estate. By a second codicil, which is contested, and which was executed a few days prior to his death, he increased a legacy given by the will to his nurse and attendant, from $1,000 to $8,000. The contest is confined to the last paper. On the morning of the 9th of January, 1901, the widow wrote to Mr. Skidmore, stating that Mr. Lacy, the testator, would like to see him at once. She testified that she sent to him for the purpose of having a codicil drawn to his will, though she did not tell him that this was the purpose for which he had been summoned. She says it was her belief that the testator intended to prepare a codicil in favor of her daughter, Camilla. Mr. Skidmore testified that, in response to this letter, he called at the residence of the testator and found him in bed. The nurse was with him in the room at the time. She aroused him, got him upon his feet, assisted him towards the middle of the room, where there was an armchair, and seated him. The witness noticed that the testator's paralysis or palsy had increased, particularly as respected his speaking. He attempted to speak, but the lawyer could not

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understand him, and then the nurse spoke to him, and interpreted for him to the effect that he wanted to make a change in his will. He tried to find out what the change was to be, and, through her interpretation, was told that he wished to leave her an increased sum over that which he had left her in the will, the original sum being $1,000, and he wished to increase it to $8,000. Becoming a little uneasy at being alone with the testator and the person he sought to benefit, he managed to have Mrs. Healy go out of the room, when he spoke to Mr. Lacy and endeavored to communicate with him directly. When the nurse departed from the room, the testator complained of the somewhat summary manner in which she had aroused him from his slumber and assisted him to his chair, saying: "She treats me as if we were man and wife. It is hardly decent." The draftsman of the will asked him whether it was his wish to make this gift to Mrs. Healy, and to the best of his understanding the testator appeared to comprehend the question, and replied that it was. He asked him if he did it of his own free will or whether he had been in any way forced into doing it, or overpersuaded or teased, and he understood him to say that he did it of his own free will and wished to do it. Thereupon, realizing that he was a sick man, and that there was no time to be lost if anything was to be done, and yet with some hesitation on account of the circumstances, he sat down and drew this codicil in his own handwriting. When it was done he handed it over to him. While he was doing so, Mrs. Healy, who had returned, helped him over to a small table near the window, on which there were writing materials. He sat down on a chair, with her assistance, in front of it, and attempted to sign his name to the document. Before attempting to sign, the witness testifies that decedent evidently read it over himself with care while he sat at the table. When witness was asked, on cross-examination, why he considered the testator to be of sound mind, he states that he reached that conclusion from all the circumstances combined; that he was largely influenced by the fact that he had received a request from Mrs. Lacy, the widow, to go there. He thought that she would not have sent for him unless she knew the purpose of the visit. He was also actuated by the fact that he was not interfered with by any of the family, and their seeming understanding of the business for which he was present. The testimony of the draftsman, with reference to the ability of the

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testator to comprehend conversation addressed to him, and to communicate his ideas to others, is confirmed by the other subscribing witness and Miss Walsh. The dominant feature of this contest is that the active contestants of this codicil participated in its execution by procuring the attendance of the draftsman with a knowledge of the purpose for which he came. It is only after they discovered that their expectations were disappointed that they declare that the testator was incompetent and was unduly influenced in its execution. The testimony of the draftsman who superintended the execution of the contested paper was characterized by extreme diffidence. He told the widow afterwards that if he had known before the codicil was executed the facts as she stated them in relation to the occurrences about the time of its execution, that he would never have been concerned in the execution of the codicil without her or some of her family being present in the room. I am satisfied that the impression created upon his mind is correct, that the difficulties of the testator in his conversation were purely physical, and that his mind was sufficiently strong to understand the nature of the act he performed. In the case at bar, as in the Matter of Bonner, 33 Misc. Rep. 9, "there are lacking many of the elements which frequently accompany the domination of one mind over another in procuring a testamentary disposition of property. No effort appears to have been made to prevent free access to the testator by the persons who are alleged to have been discriminated against in the instrument. * * * The terms of the will * * * are not 'grossly unjust or the division unequal.'" On the contrary, it conforms to his previously expressed desire to reward the beneficiary for her long years of devotion, and the legacy is not disproportionate. The "prominent and commanding figure" of the nurse in the household affairs complained of may have been due to the abdication by the widow of her wifely positions and duties, rather than to any unwarranted assumption or interference on her part. The assertion of undue influence is disproved by the prior life, conduct and character of the testator before and during his illness, and up to the very day before the contested paper was executed. A decree may be submitted admitting the codicil to probate.

Probate decreed.

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Matter of the Transfer Tax on the Estate of TIMOTHY B. BLACKSTONE, Deceased.

(Surrogate's Court, New York County, July, 1901.)

Transfer tax — Exemption of a transitory deposit of a non-resident decedent — L. 1896, ch. 908, § 220, subd. 3, amd. L. 1897, ch. 284, § 2.

A non-resident of the State of New York, who had sold his interest in a foreign railroad company to a syndicate, for fourteen months before his death had on deposit, with a New York depositary of the syndicate stock, about $5,000,000 resulting from the sale of his own and this the depositary carried on its books merely as "deposits in trust" and was paying him certain interest thereon subject to the proviso that he should not draw more than $100,000 except upon two days' notice. In the meantime the depositor had been trying to invest the deposit but had failed to do so both because of his continuous ill health and of the magnitude of the deposit.

Held that the deposit was not "property within the State" within the meaning of the Tax Law, as amended in 1897, and therefore was exempt from the transfer tax.

Timothy B. Blackstone died on the 26th of May, 1900, in the city of Chicago, Cook county, Illinois, being a resident of and domiciled in said city. On or about March 31, 1899, the decedent deposited with the United States Trust Company of New York the sum of $4,881,556.72, and had on deposit $10,692.24 with firm of Cuyler, Morgan & Co., bankers of New York.

Proceedings were commenced in the Surrogate's Court of New York county to appraise the property of the decedent, which was subject to a tax under the act in relation to taxable transfers of property, and his property was accordingly assessed by the appraiser at the sum of $4,553,609.58.

The grounds upon which the appeal was taken were: That the decedent was not a resident of the State of New York at the time of his death, and left no property in this State. That if the property of the decedent at the time of his death in the possession of the trust company and firm of Cuyler, Morgan &

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Co. can be deemed, for any purpose, property thus situated within the State of New York, such property was only transitorily within this State. That the tax upon said property had been duly assessed by the County Court of Cook county, Illinois, and paid by the appellant to the treasurer of Cook county. That this court had no jurisdiction. That the Transfer Tax Law of New York does not include in its operation the property owing to decedent at the time of his death by said trust company or firm.

Respondent's contention was that, under Laws of 1896, chap. 908, as amended by Laws of 1897, ch. 284, the deposits made by deceased and held by said trust company and firm for his account was "property within the state," in the meaning of the provisions quoted; also citing section 242 of the Tax Law (Laws of 1898, chap. 88), as to definition of the word "property."

Edward W. Sheldon, for executor.

Julius Offenbach, for City Comptroller.

FITZGERALD, S. The decedent, a non-resident, died in May, 1900, leaving nearly $5,000,000 with the United States Trust Company, and over $10,000 due him on an account with a firm of bankers in this city. The deposit with the trust company arose under the following circumstances: The decedent had been for many years the president and a large stockholder in an Illinois railroad company. In March, 1899, an agreement was entered into for the purchase of this stock by a syndicate, which sought to obtain a controlling interest in the railroad. In pursuance of this agreement, the decedent joined with other stockholders in the sale of his shares. The trust company was made the depositary of the stock to be purchased, and was authorized, upon receiving the certificates, duly indorsed, to pay the agreed price therefor. Decedent communicated with the trust company, inquiring whether, in case he sold, he might leave the proceeds with it; that he was at a loss to know how safely to invest these proceeds, and might wish to deposit a considerable sum for several months. The trust company replied that it would receive such proceeds, hold them subject to his order and allow interest thereon at a specified rate, but if he would require more than $100,000

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he should not draw upon the trust company except upon two days' notice. These terms were acceded to, and, on the 29th day of March, 1899, his stock certificates were delivered to the trust company, who made a book transfer of the purchase price from its accounts with the purchasing syndicate to a new account in decedent's name, entitled "deposits in trust." No certificate of deposit nor pass-book was issued, and the only evidence of the deposit was this book entry and the correspondence stated. Up to the time of his death, the decedent had withdrawn about $200,000. The appellant alleges that it was decedent's fixed intention to leave this balance with the trust company only temporarily and pending its investment; that, owing to his ill-health, which was continuous and progressive from the date of the deposit until his death, he was unable to carry out his intention. On several occasions he expressed disappointment at his failure, and complained that he was suffering great pecuniary loss in consequence. In Matter of Leopold, 35 Misc. Rep. 369, I had occasion to pass upon the taxability of a deposit made under somewhat similar circumstances, and I there held that where a decedent had deposited, three days prior to his death, a sum of money to the credit of a syndicate formed for the purchase of stock, which purchase was completed within a month succeeding his death, the property was only transitorily here and was not liable to taxation under the Transfer Tax Law. In the present case, while the property remained here for more than a year, the proof shows that the money realized upon the sale of the securities was of great magnitude; that the reason why it was not removed from the State sooner was because of the difficulties experienced in making new investments and the ill-health of the owner. I can see no difference in principle between the two cases, and, upon the authority of that case and of the cases cited in the memorandum handed down in that case, I sustain the appeal.

Appeal sustained.

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Matter of the Estate of JOSEPH H. SNYDER, Deceased.

(Surrogate's Court, New York County, July, 1901.)

Trust — Invalid accumulation — Of income not absolutely payable to a minor at majority — To pay mortgages — L. 1896, ch. 547, §§ 51, 76; 1897, ch. 417, § 4.

Accumulation of the income of a legacy to a minor, where the income is not directed to be paid him at majority but is required in a certain contingency to be held in trust for him for life and thereafter to be distributed to other persons, is forbidden by statute and the illegal accumulation, when not otherwise disposed of, passes to the parties entitled to the next eventual interest or estate in the fund which produced it.

Income of a trust cannot lawfully be directed to be applied to the payment of mortgages on the testator's realty, as this constitutes an illegal accumulation, which also passes to the owner of the next eventual estate.

PROCEEDINGS upon the judicial settlement of the accounts of executors.

Deyo, Duer & Bauerdorf (Robert E. Deyo, of counsel), for executors.

Jordan J. Rollins, special guardian of infant remaindermen.

FITZGERALD, S. The testator, by the second and seventh clauses of his will, directed other payments to be made out of the income of his estate, besides the one-half thereof given to the widow and the legacy in question. The provisions of the will with respect to this legacy, when considered in connection with the direction for the payments referred to, and the extent of the income yielded by the estate, show, it seems to me, that the testator intended that the principal of the legacy should be made up and provided from accumulated income. As this income was not absolutely directed to be paid to the primary legatee, who was a minor, upon his attaining majority, but was required, in a certain contingency, to be held in trust for his benefit for life, and to be distributed among other persons after his death, the legacy is void, as it involves an accumulation of income for a

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purpose prohibited by the statute. Laws of 1896, chap. 547, art. 2, § 51; id., art. 3, § 76; Laws of 1897; chap. 417, art. 1, § 4. For the same reason, the provision for the application of income to the payment of the mortgages upon the real estate left by the testator is void. Hascall v. King, 162 N. Y. 134. The income so illegally required to be accumulated, not being otherwise disposed of, goes, pursuant to the statute, to the parties presumptively entitled to the next eventual interest or estate in the fund which produced it. Cochrane v. Schell, 140 N. Y. 516. These persons are those among whom the principal of the estate left by the decedent is directed to be divided upon the death of his widow.

Decreed accordingly.

Matter of the Estate of JOSEPHINE L. NEWCOMB, Deceased.

(Surrogate's Court, New York County, July, 1901.)

Transfer tax — Fund in litigation not taxable.

Where a trust fund, alleged to form a part of the estate of a decedent, is claimed by her husband's heirs and proof is made that they intend to litigate their claim up to the court of last resort, no transfer tax can presently be imposed upon the fund nor hereafter unless the estate of the decedent shall succeed in the litigation.

PROCEEDINGS upon the report of an appraiser, appointed under the Transfer Tax Act.

Wilmer & Canfield, for executors.

Julius Offenbach, for comptroller.

FITZGERALD, S. Included in the property assessed for the purpose of taxation by the appraiser is a trust fund, which is claimed by the heirs of decedent's deceased husband. It appears by the affidavit of one of the executors, annexed to the report, that the attorneys for these heirs intend to litigate this claim and to carry the matter to the court of last resort; that the ownership of said fund is, therefore, at the present time undetermined. In Matter of Westurn, 152 N. Y. 93, where an alleged asset of the estate

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was in litigation, the court said (p. 103): "It was, we think, the plain duty of the surrogate to have excluded this claim from valuation at the time, reserving it for future appraisement in case the administrator succeeded in collecting it." With respect to another claim, also in litigation, the court stated that, if it was well founded, it was manifest a tax could not be assessed against the appellants; that they would, in the case supposed, have no taxable interest, and the surrogate should have postponed the appraisement until the litigation was determined. The amount of this trust fund must be excluded in determining the value of the estate presently taxable. An order may be entered accordingly, which may in terms reserve this fund for a future appraisal in the event that the litigation terminates favorably to the estate.

Decreed accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* ELIZABETH HAREN, Defendant.

(County Court, Rensselaer County, July, 1901.)

Liquor Tax Law — Indictment imperfect only in form — Charging one crime — Joint sale of liquor and proof — Exceptions not appearing in the enacting clause of a statute need not be negatived by the prosecution — L. 1896, ch. 112, § 31, subd. a, § 33; 1897, ch. 312, § 22 — Code Crim. Pro., §§ 265, 278, 279, 284, 285.

An indictment, entitled "Supreme Court of the County of Rensselaer", is not demurrable for that reason, as the presence of the word "of" instead of "in", or a comma, will be deemed an "imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits", within Code Crim. Pro., § 285.

An indictment which, in one count, charges the crime of selling liquor on Sunday, and, in another, the crime of offering and exposing it for sale on Sunday, the description of the date, place, persons and goods sold or offered for sale, being identical in each count, does not charge two crimes, but different aspects of the single crime described in L. 1896, ch. 112, § 31, and subd. a.

A count, alleging that the defendant "unlawfully did sell to Charles H. Morris and to certain other persons whose names are unknown

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to the grand jury", charges only a joint sale to the persons indicated; the charge will be sustained by proof of one sale and not more than one sale can be proved under the count.

A count, otherwise sufficient, need not allege that the defendant was not a hotel keeper, nor that the alleged purchasers of liquor were not his guests, or that the sales were made to them in the barroom or other similar rooms, as these provisos or exceptions of the statute need not be negatived by the prosecution since they do not appear in the declaratory or enacting portion of said section 31, as amended by L. 1897, ch. 312, § 22, but are found in a subsequent independent part of the section and moreover do not relate exclusively to sales on Sunday.

DEMURRER to indictment.

Jarvis P. O'Brien, assistant district attorney, for people.

Jeremiah K. Long, for defendant.

NASON, J. The defendant in this case was indicted on the 10th day of April, 1901, by a grand jury of Rensselaer county, convened at the same time with the trial term of the Supreme Court, for a violation of the Liquor Tax Law, the indictment containing two counts, one for the crime of selling liquor on Sunday, November 11, 1900, and the other for exposing liquor for sale on the same day.

The indictment, by order of the Supreme Court, was sent to the County Court of Rensselaer county, and upon arraignment in the County Court, the defendant demurred to the indictment upon various grounds. These grounds may be briefly discussed and disposed of seriatim.

First. The defendant's first ground of demurrer was that the indictment does not conform substantially to the requirement of section 265 of the Code of Criminal Procedure, in that there is no such court as the Supreme Court of the county of Rensselaer, the indictment being entitled "Supreme Court of the County of Rensselaer."

It would not seem that this defect should be allowed to invalidate the indictment. Section 284 of the Code of Criminal Procedure provides "The indictment is sufficient, if it can be under-

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stood therefrom: 1. That it is entitled in a court having authority to receive it though the name of the court be not accurately stated."

Section 285 provides, "No indictment is insufficient nor can the trial, judgment or other proceedings thereon be affected, by reason of an imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits."

This court can take judicial notice that there is only one Supreme Court which is organized and acting under the Constitution of the State; that such court, at certain designated times, holds its trial terms in Rensselaer county, for which grand juries are impanelled and summoned and at which they attend, and of all other constitutional provisions, rules, laws and statutes affecting our system of judicature and administration of criminal justice, and must, therefore, almost of necessity, conclude that this indictment was found in the Supreme Court of the State of New York, and that the presence of the word "of" instead of the word "in" or in place of a comma, was the result of pure inadvertence and clerical error on the part of the pleader. It would not seem that the defendant could possibly have been misled or prejudiced by such an unimportant defect, which must be deemed as a "mere imperfection of form" and can, therefore, be disregarded.

Second. A further ground of demurrer is that the indictment charges more than one crime, in that it charges in the first count the crime of selling liquor on Sunday, and in the second count charges the crime of offering and exposing for sale liquor on Sunday.

Section 278 of the Code of Criminal Procedure provides: "The indictment must charge but one crime and in one form, except as in the next section provided."

Section 279 reads: "The crime may be charged in separate counts to have been committed in a different manner, or by different means; and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts."

In view, therefore, of the identity in the description of the date, place, persons, goods sold or offered for sale in the two counts, the only obvious and reasonable interpretation of the indictment is that the two counts present different aspects of the same transaction, and that only one punishment could be imposed

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upon a general verdict of guilty. People ex rel. Tweed v. Liscomb, 60 N. Y. 559.

Our attention has been called to section 33 of the Liquor Tax Law, which provides that "Any person engaged in the traffic in liquors * * * shall upon conviction of a violation of any of the provisions of this act be liable for and suffer the penalties imposed therein; * * * and each violation of any of the provisions of this act shall be construed to constitute a separate and complete offense, and for each violation on the same day, or on different days, the person or persons offending shall be liable to the penalties and forfeitures imposed by this act."

The identity of the transaction set forth in the first count with the transaction set forth in the second count, the same matter being simply differently characterized in each count, is plain on the face of the indictment. Both counts clearly refer to the one crime, and are defined in the second paragraph of the introductory part of section 31 taken in connection with subdivision *a;* and it may be added that the allegation that the defendant "unlawfully did sell to one Charles H. Morris and to certain other persons whose names are unknown to the grand jury," in legal effect, charges a joint sale to the persons indicated and not separate sales, and that the charge will be sufficiently sustained by proof of one sale under the circumstances, alleged to one or more, although proof of more than one sale under such an indictment must be excluded. People v. Adams, 17 Wend. 475; People v. Harmon, 49 Hun, 558; People v. Huffman, 24 App. Div. 239; People v. Schmidt, 19 Misc. Rep. 458; People v. O'Donnell, 46 Hun, 360; People v. Satchwell, 61 App. Div. 312.

Third. Another ground for demurrer is that each count fails to state facts sufficient to constitute a crime, required to be stated within the provisions of section 31 of the Liquor Tax Law, in that it fails to show "that the defendant was not a hotel keeper and that the persons to whom the sales of liquor are alleged to have been made, were not guests of the hotel and that such sales were made to them in the barroom or other similar hotel rooms."

This contention cannot be successfully maintained. The general rule is well settled that "Where the exception itself is incorporated in the general clause, * * * it is correct to say, whether speaking of the statute or private contract, that unless the

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exception in the general clause is negatived in pleading the clause, no offense or no cause of action, will appear in the indictment or declaration when compared with the statute or contract, but when the exception or proviso is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated, without negativing the exception or proviso, as a *prima facie* case is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defense." See U. S. v. Cook, 17 Wall. 175; Fleming v. People, 27 N. Y. 329; Jefferson v. People, 101 id. 20.

In other words, if all the elements of the offense as together set forth in the indictment constitute a crime as defined in the law or statute, then exceptions or provisos not appearing in the enacting clause which exempts certain persons from the operation of such law or statute, by reason of their character or condition, or that limits its generality as governing all cases to which it might otherwise be applicable, need not be negatived, and sometimes, even if the exceptions or provisos appear in the enacting clause if not necessary to be alleged as a part of a *prima facie* case, they need not be negatived, but must be proved as defensive matter.

In accordance with these views, the framing of an indictment so that all the elements involved in the definition of the crime may be made to appear and thus fulfill the laws of pleading with regard to negativing or ignoring exceptions, may depend quite as much upon the phraseology and grammatical construction of the statute as upon the logical connection of its parts. For it is not difficult to conceive many cases where, by simply transposing the location of certain clauses in the statute, provisos and exceptions that might otherwise be ignored in drawing an indictment would have to be expressly negatived, because they would thus become incorporated into the definition of the offense. According to this criterion, the pleader was under no necessity of negativing in this indictment any of the exceptions of the statute as claimed by the defendant.

Section 31 of the Liquor Tax Law enumerates a large number of acts forbidden by statute and denounced as unlawful, among which we find the sale or offering for sale of liquor on Sunday. The declaratory part of each of these subdivisions of this section is in itself an enacting clause. Subsequent to this enumeration

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of misdemeanors, under the act, appear certain complicated and involved paragraphs that are grammatically quite independent of and disconnected from the matter immediately preceding it, and none of which are exclusively referrable to any one of these prohibitions, but relate to groups of them. The first and second of these qualifying paragraphs, which secure to pharmacists and hotel-keepers the right of selling or disposing of liquor on Sunday under certain conditions, have no more reference to sales on Sundays than to sales on other days, between one and five o'clock in the morning, or on election day or upon agricultural fair grounds. See People v. Crotty, 22 App. Div. 75.

Under the authorities and upon the reasoning stated, therefore, it is impossible to interpret the statute as if these provisos or exceptions relating to pharmacists and hotel-keepers were actually incorporated in the enacting clause restraining Sunday selling, and should, therefore, be negatived in an indictment charging that offense.

This defendant has been sufficiently apprised of the accusation that has been made against her by a particular description of her alleged offense, corresponding to the definition of the statute, and there would seem to be no good ground, reason or justice why the pleader should be compelled to allege in the indictment the absence of that which the defendant is compelled to prove as a matter of defense.

The demurrer must, therefore, be disallowed.

Demurrer disallowed.

JOHN M. SCHULTZ, Plaintiff, *v.* THE BRACKETT BRIDGE CO., Defendant.

(Supreme Court, Onondaga Special Term, July, 1901.)

Test of partnership inter se — Intent — Share of profits as compensation and accounting therefor at law — Vacation of an attachment refused where it was disputed whether the action was legal or equitable and the merits were involved.

The intent of the parties as shown by all their agreements and acts governs, in part, the decision of the question whether they were partners.

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The fact that one of them was to receive as compensation a share of the profits, requiring for its determination an accounting, does not decisively determine that the arrangement was a partnership nor is an action in equity necessary to such an accounting as it may be had in an action at law.

Where the plaintiff sued a foreign corporation at law to recover, as he alleged, a share of the profits of certain contracts as compensation for having procured them for the defendant as its agent and obtained in the action an attachment accompanying the summons, and the defendant gave evidence upon the trial, still pending before a referee, that the parties were partners, and it appeared that a motion to dismiss the complaint upon the ground that the action was one at law, that the plaintiff's own evidence had established the partnership and that there could be no recovery under the complaint had already been denied by the referee, the Special Term refused, pending the action, to vacate the attachment — on the defendant's alleged ground that the action was equitable and therefor an attachment could not be granted therein — for the reasons, first, that the referee had already denied that contention during a trial unfinished and, second, because the question affected the merits of the action and they ought not to be decided upon such a preliminary motion.

MOTION to vacate an attachment.

W. G. Tracey, for motion.

James E. Newell, opposed.

HISCOCK, J. The attachment in this action was granted to accompany the summons on the ground that the defendant is a foreign corporation. The motion to vacate said attachment is made upon the ground that plaintiff's cause of action is really one in equity for an accounting between himself and the defendant as copartners, and that, therefore, an attachment will not lie. Support for the motion, upon the ground in question, is sought by defendant in the evidence given upon the trial of the case upon its merits before a referee, and which evidence discloses the fact that plaintiff was to receive a share of the profits realized upon bridge contracts which he might obtain, the question being controverted here whether he was to receive such share in profits merely as compensation for his services as an agent and employee

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of the defendant, or whether he was to receive it through an arrangement which amounted to a partnership between him and the defendant.

Plaintiff's complaint, upon which the attachment was, in part, at least, founded, clearly sets forth a cause of action at law, it distinctly alleging, in substance, that he was to receive a share in the profits realized upon bridge contracts by way of compensation for his services as agent in procuring them. The evidence and affidavits submitted to me upon this motion certainly do not establish, beyond any question, that his relations with defendant were those of a partner, and that this is an action in equity.

The question whether a partnership exists or not depends, in part, at least, upon the intent of the parties to be gathered from all of their agreements and acts. Heye v. Tilford, 2 App. Div. 350.

The mere fact that a person is to receive for services a share in the net profits of a business, and that an accounting is necessary to ascertain the amount of the compensation, does not decisively settle that the arrangement is a copartnership, and does not require an equity action. An accounting is proper in an action at law, and the introduction of the requisite evidence does not change the nature of the action. Smith v. Bodine, 74 N. Y. 30.

Plaintiff, as stated, clearly sets forth, in his complaint, an action at law, and if he fails to establish a cause of action under his complaint, defendant, of course, will be entitled to a judgment dismissing the complaint. This question, whether a partnership exists or not, is to be determined within the principle of the cases above cited, from all of the evidence which may be presented. The question is one which is now upon trial upon the merits before the referee, and upon which a large amount of evidence has already been produced. The precise question here presented has been presented upon said reference by a motion of the defendant to dismiss plaintiff's complaint, upon the ground that his evidence established that he and defendant were copartners, and that there could be no recovery under the complaint; that the cause of action set up in the complaint is one at law, upon which an attachment had been issued and levied, and that the plaintiff's testimony showed that the plaintiff and defendant were to share in the losses as well as the profits. This motion was denied.

Therefore, to pass upon this motion at this time would require

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a decision, upon affidavits and incomplete evidence, of a question which is involved in the merits of the trial now proceeding before the referee. Independent of the undesirability of thus anticipating the decision of the referee upon the trial, I am averse to deciding the merits of an action upon a preliminary motion of this kind. Kirby v. Colwell, 81 Hun, 385; Chambers & McKee Glass Co. v. Roberts, 4 App. Div. 20; Furbush v. Nye, 17 id. 325.

The motion to vacate the attachment is, therefore, denied, with ten dollars costs.

Motion denied, with ten dollars costs.

Matter of the Application of STEPHEN CHENEY for an Order Cancelling and Revoking the License of MARCUS A. MUCKEY.

(Supreme Court, Onondaga Special Term, July, 1901.)

Liquor Tax Law — Computation of radius of two hundred feet — Door of saloon — Door cut to prejudice an applicant.

The entrance, from and to which, distance is to be computed in determining what buildings, if any, are within a radius of two hundred feet of a proposed saloon, is the one opening into the wall of the saloon building rather than a door set back from the wall in the entrance way.

Where the owner of a building, occupied exclusively for a dwelling, cut a new door thereto after the saloon keeper had paid his license fee and finished the door on the day when the certificate was issued and made the door apparently to affect the right to procure the certificate — which the said owner here contests — the court held that this new door could not properly be considered in determining the saloon keeper's right to a certificate.

PROCEEDINGS under the Liquor Tax Law.

Edward C. Wright, for petitioner.

William F. Rafferty, for defendant Muckey.

HISCOCK, J. The report of the referee in this matter is confirmed, and the application for an order cancelling the liquor tax license in question is denied for the following reasons:

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1. The entrance from and to which distance is to be computed for the purpose of determining what buildings, if any, are within a radius of 200 feet, is the entrance or opening into the wall of the building occupied as a saloon. Such entrance or opening in this case is controlling, rather than the location of the door set back from the wall in the entrance way.

2. The application for the license in question upon March 27, having been made, and the license fee having been paid before the new door in what is described in the proceedings as the parsonage was cut, the status of the application, in my opinion, is to be governed by the facts and conditions existing at and prior to that time, rather than by those which occurred thereafter. The fact that the petition was temporarily withdrawn for a few hours, in order to correct some error or irregularity, would not, in my opinion, prevent the application from relating back to the time when it was originally made.

3. The new entrance to the building called the parsonage was cut and made through the efforts of the petitioner, and was completed upon the day when the license was granted and, apparently, after the original application was made upon that day. The facts seem to indicate that the new entrance was created for the purpose of affecting the right of the applicant to procure a license, and I do not believe that, under all of the circumstances of the case, such new entrance can be taken into account in determining his rights to a license. The petition is, therefore, dismissed.

Petition dismissed.

THE PEOPLE ex rel. JALBERT SCOBELL, Relator, *v.* JOHN KILBORN et al., Assessors of the Village of Cape Vincent, Respondents.

(Supreme Court, Onondaga Special Term, July, 1901.)

Tax — Waiver by assessors of a failure to file, with them, a verified statement of the respect in which an assessment complained of was excessive — L. 1896, ch. 908, § 36.

A failure, upon the part of a complainant against an assessment as excessive, to file with the assessors, on review day, a statement under

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oath specifying the respect in which the assessment complained of is incorrect, as required by the Tax Law of 1896, is waived by the assessors, and cannot prejudice the right of the complainant to a subsequent review by certiorari, where the relator appeared before them on the review day and insisted that his valuation should be reduced, and they, without requiring of him the statutory statement, or objecting to its absence, or taking his evidence orally, reduced his assessment to some extent.

The relator has sued out a writ of certiorari by which to review an assessment made by the defendants of certain property of his situate in the village of Cape Vincent, on the ground that the valuation placed thereon is excessively high. Upon the return day of the writ, the defendants appeared and made a preliminary motion to have the writ quashed, failing in which, they desire to have their return to such writ filed and an order of reference made under the statute.

J. W. Cornaire, for relator.

Watson M. Rogers, for respondents.

Hiscock, J. Upon the proper day and at the proper time, the relator appeared before the assessors and verbally objected to the valuation placed upon his property in question in Cape Vincent, stating, in substance, that the property was valued at more than it cost or was worth, and that the valuatiion should be reduced. He did not file a statement, under oath, specifying the respect in which the assessment complained of was incorrect, etc., as provided by the statute. He did, however, offer to be sworn and examined upon the subject. So far as appears, the assessors did not object to this method of procedure. They did not ask for any verified statement, and they did not examine the plaintiff, and subsequently they did act upon his protest and objection, to the extent of reducing the valuation complained of, by the sum of $500.

The objection urged to relator's proceeding, and upon which it is asked to have this writ quashed, is that he did not file such written statement. I think, however, that the conduct of the assessors, upon the occasion in question, in receiving his parol statement and not taking his evidence, and in subsequently acting

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upon such proceedings, without any objection, and reducing his assessment, was a waiver of his failure to file a written statement, which they had full power and jurisdiction to make, and that, therefore, the objection in question is not well taken. People ex rel. West Shore R. R. Co. v. Johnson, 29 App. Div. 75; People ex rel. Eckerson v. Christie, 115 N. Y. 158.

The motion, therefore, to quash the writ is denied, with ten dollars costs, and an order of reference will be made under the statute. The parties may agree upon and submit the name of a referee, if possible; otherwise, the court will appoint one.

Ordered accordingly.

Matter of the Application of JAMES H. MEAGHER, Commissioner of Public Works of the City of Syracuse, to Acquire Title for, in Behalf of and in the Name of the City of Syracuse, to Certain Real Property Situated in Said City, for Public Park Purposes.

(Supreme Court, Onondaga Special Term, July, 1901.)

Condemnation — Petition insufficiently showing the "necessity" of acquiring lands for a public park — Code C. P., §§ 3360, subd. 3; 3369.

Under the Code provisions requiring the petition in condemnation proceedings to allege "The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use", allegations, upon the part of the city, that the property to be taken is required for public park purposes and that the people in that section of the city are desirous of a place to beautify their section and a place for recreation, are insufficient to authorize condemnation, even where no answer has been interposed.

The petition should also show the situation of the neighborhood, the extent of the population there, the fact, if it be so, that there is no other or sufficient place for the recreation of the people of the section and such other facts as may bear upon the necessity of the use for public purposes of the land proposed to be taken.

PROCEEDINGS for the condemnation of certain real estate situate in the city of Syracuse for the purpose of a public park.

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M. Z. Haven, Corporation Counsel, for petitioner.

William F. Rafferty, for Matilda D. Wells and others, owners.

HISCOCK, J. This is an application in behalf of the petitioner acting for the city of Syracuse for a judgment providing for the condemnation of certain real estate in the city of Syracuse for the purpose of a public park, and for the appointment of commissioners, etc. No defense or answer has been interposed by the owners of the property, Matilda D. and J. Emmet Wells, or other opposition made to the granting of the application. The statute (Code C. P., § 3369) provides that, under such circumstances, if "it appears from the petition" that the petitioner is entitled to the relief demanded, judgment shall be entered adjudging that the condemnation of the real property described is necessary for the public use, etc. The statute further provides (Code C. P., § 3360, subd. 3) that the petition, to be presented upon such an application, shall set out the "public use for which the property is required and a concise statement of the *facts* showing the necessity of its acquisition for such use." The petition presented in this case does not, in my opinion, set out sufficient facts to authorize the court to give the judgment asked for. The only allegation upon this subject is "The public use for which the property is required is for public park purposes. That the people in that section of the city are desirous of a place to beautify their section and a place for recreation." In my judgment, further facts than this should be set forth in the petition, showing the situation of the neighborhood in which the land sought to be condemned is situated, the extent of the population there, the fact, if it so be, that there is no other sufficient or proper place for the necessary and proper recreation and enjoyment of the people living in that section, and such other facts as may bear upon the *necessity* of the use of this land for public purposes, for that is the test which the statute applies.

In accordance with these views, an amended petition may be filed, setting out further and additional facts as required by the statute, or, if preferred by the parties, this court will appoint a referee to take evidence and report upon the subject.

Ordered accordingly.

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JENNIE B. McGOWAN, Plaintiff, *v.* WILLIAM C. TIFFT et al., Defendants.

(Supreme Court, Onondaga Special Term, July, 1901.)

Equitable conversion — Partition not maintainable by a distributee under a will where it directs an equitable conversion.

The question of equitable conversion is largely one of intent and such an intention upon the part of a testator may be found although the power to sell contained in his will is not in terms imperative.

Where the provisions of a will work a conversion of the testator's realty into personalty and vest the latter in a trustee, a child, entitled to a distributive share of the proceeds, takes no title to the realty and therefore cannot maintain an action to partition it.

ACTION for partition.

George W. Driscoll, for plaintiff.

Eugene M. White, for defendant Wilson and others.

N. R. Peckham, for defendant Patterson and others.

Cooney & Weller, for guardian *ad litem*.

HISCOCK, J. This is an action for partition. The question whether plaintiff has any legal title to and interest in the premises of which partition is sought depends upon the construction of the will of one James Auyer, her father. It is claimed by her that, under such will, she did take an interest in the farm in question. Upon the other hand, it is claimed by the defendants that the will in question provided for and, in effect, directed the sale of the real estate and a conversion of it into money, with subsequent division of the proceeds amongst the plaintiff and others, so that there has been an equitable conversion of real estate, with the title thereto, at present vested in the trustee, and that no title thereto, or any part thereof, vested in the plaintiff. I am inclined to think that the latter contention is the correct

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one. The language of the will in question does not specifically and absolutely, in so many words, direct the sale of this real estate. It does, however, authorize and empower the sale thereof, and the entire scheme of the will, so far as it relates to the subject of the present controversy, contemplates and is based upon such sale.

The question of equitable conversion is largely one of intent, and such intent may be found, although the power of sale is not in terms imperative. I think the doctrine that an equitable conversion has been provided for in this case comes well within the principles of Power v. Cassidy, 79 N. Y. 602; Salisbury v. Slade, 160 id. 278; Morse v. Morse, 85 id. 53; Lent v. Howard, 89 id. 169; Gourley v. Campbell, 66 id. 169.

In addition to the terms of the will themselves, there was some evidence in regard to the situation of the estate covered thereby which sustains the conclusion that the testator intended to have a sale of the real estate involved here and a conversion thereof into personal property.

Ordered accordingly.

THE CENTRAL TRUST COMPANY OF NEW YORK, Plaintiff, *v.* THE UNADILLA VALLEY RAILWAY COMPANY et al., Defendants.

Matter of the Application of FREDERICK DE COPPET and Others to Intervene in the Above-Entitled Action.

(Supreme Court, Onondaga Special Term, July, 1901.)

Foreclosure — Default caused by alleged tort of those controlling the (railroad) property — Protesting bondholders, not parties, permitted proof before a referee to compute.

Allegations upon the part of holders of railroad bonds, secured by a trust mortgage in process of foreclosure, to the effect that foreclosure was made necessary because persons, controlling the road and substantially all the other bonds, failed to pay the interest and that they had so failed because they had improperly diverted the funds of the road, are insufficient to prevent a reference to compute

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the amount due, on default made, but the court permitted such holders, although not parties, to appear on such reference and give evidence in support of their contentions and also directed the referee to report whether, in his opinion, a wrongful diversion of the funds of the road had caused the foreclosure.

MOTION for an order of reference upon default, to compute amount due upon the bonds. Application by petitioners for leave to intervene and defend.

Butler, Notman, Joline & Mynderse, for plaintiff.

H. V. N. Philip, for petitioner de Coppet.

Edward M. Wells, for petitioner Henry H. Cooper.

HISCOCK, J. This is an action to foreclose a mortgage made to secure certain bonds of the above-named defendant. Two motions are before me. One is by the plaintiff for an order of reference upon default to compute the amount due upon the bonds, etc. The other is an application in behalf of the above-named petitioners for leave to intervene and defend in this action. Various grounds have been urged why the latter motion should be granted. One of the petitioners owns a large amount of the bonds secured by the mortgage of which foreclosure is sought. The other petitioner owns a substantial amount of the income bonds issued by the above-named defendant. The only proposed defense in regard to which, in my judgment, it can be said that any substantial or definite evidence has been given upon this motion is the one that the people in control of the affairs of the defendant railroad, and who own substantially all of the other mortgage bonds, have improperly diverted the funds of said road, which should have been applied to the payment of installments of interest, thereby causing the default and foreclosure in question. I do not intend to indicate that any such condition of affairs has been established to my satisfaction upon this motion. I have concluded, however, as a condition of denying the motion of petitioners for leave to intervene and defend herein, to grant them the right to appear by counsel upon the reference to compute the amount due upon

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said bonds, etc., herein asked for, and give evidence upon said subject, and to have the referee appointed to compute the amount due, take such evidence and any offered in opposition thereto, and report, with his opinion, whether there has been any such diversion of funds which is responsible for the default complained of herein. The motion of plaintiff for an order of reference, therefore, is granted, and the application by petitioners for leave to intervene and defend herein is denied upon such condition, that said petitioners have leave to so appear upon said reference and that said referee be authorized and empowered, under the order, to take evidence upon such issue and report thereon, with his opinion. In case the parties opposing the application of the petitioners for leave to intervene herein, who are not in default, refuse to consent to such condition, then the motion for an order of reference is denied and the application of petitioners for leave to intervene and answer herein is granted.

In case the parties are unable to agree upon the form of order herein, it may be settled upon one day's notice, at any time on or before July 11, at my chambers.

Ordered accordingly.

CHARLES D. BOIGEOL, Plaintiff, *v.* HARRIET M. EIGABROADT et al., Defendants.

(Supreme Court, Onondaga Special Term, July, 1901.)

Foreclosure — Election, to accept option to foreclose for unpaid installment, shown by action brought.

Where the mortgagee is given by a mortgage an option to foreclose it upon a failure of the mortgagor for sixty days to pay an installment of principal or interest, the mortgagee's commencement of an action of foreclosure sufficiently indicates his election in the matter, and his right so to foreclose is not affected by another clause of the mortgage, relating to taxes and assessments only, under which sixty days "after demand and notice" in regard to them must elapse before the whole amount shall become due.

ACTION to foreclose a mortgage.

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Nottingham, Pierce & Elliott, for plaintiff.

H. & W. Weston, for defendant Duffus.

HISCOCK, J. The clause in the bond and mortgage involved in this suit, providing for a period of sixty days "after notice and demand" before the whole amount conditioned and secured to be paid by the bond and mortgage should become due upon default, relates to default in the payment of taxes and assessments. This reqirement of notice and demand does not relate or apply to a default in the payment of the principal or interest agreed to be paid by the bond and mortgage. A default in the payment of any such installment for the period of sixty days makes due the entire amount of the principal and interest at the election and option of the mortgagee. Such election and option was manifested by the commencement of this suit, and, in accordance with these views, the plaintiff is entitled to a foreclosure of his mortgage for the full amount.

Judgment for plaintiff.

KATE BUSCHMANN, as Administratrix, Etc., of HENRY BUSCHMANN, Deceased, Plaintiff, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, Queens Special Term, July, 1901.)

New York city — Illegal reduction to patrolman of said city of a Long Island city police captain transferred upon consolidation — Construction of section 281 of the charter — L. 1897, ch. 378, sub. ch. VIII and §§ 279, 281, 283, 287, 288 and 299.

The charter of the city of New York passed in 1897 gave its board of police commissioners no power to reduce a lawfully appointed police captain of Long Island city, entitled there to a salary of $1,800 per annum and upon consolidation transferred under section 279 of the said charter, to the rank of a patrolman in New York city at a salary of $1,000 per annum.

Where it appeared that, although he served as patrolman, he protested against the reduction in rank and against his services as pa-

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trolman and also began legal proceedings to procure recognition as a captain of the New York force, his administratrix was held entitled to recover of the city of New York salary for the term of his service therein upon the basis of the pay of one of its police captains, less what he had been paid in his lifetime as a patrolman and the assessment for the police pension fund.

Section 281 of the said charter, empowering the said board "to fix and assign the rank, title, duties, powers and place of service of said transferred members" was intended to apply only to cases where a policeman of the consolidated municipality had been acting, prior to consolidation, in a rank, by a title, and with duties and powers, at variance with those named and specified in and for the force created by the said charter and was intended as a means of bringing him into conformity therewith and not as authority to reduce his rank after consolidation.

ACTION to recover the difference in salary, alleged to be due the plaintiff's intestate, between that of a captain and that of a patrolman.

Thomas P. Burke (Geo. W. Stephens, of counsel), for plaintiff.

John Whalen, Corporation Counsel (James T. Malone, of counsel), for defendant.

GARRETSON, J. All of the material allegations of the complaint are admitted by the answer — the denials being of conclusions of law.

The following facts appear in the case:

On December 31, 1897, Henry Buschmann, the plaintiff's intestate, was a captain of police in Long Island city; on February 1, 1898, the board of police commissioners of the defendant refused to recognize him as a member of the police force in any other capacity than that of a patrolman, and assigned him to duty as such; on February 26, 1898, he instituted a special proceeding in this court to secure recognition and reinstatement as a captain, and such proceedings were pending and undetermined at his death, on October 8, 1898.

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From the time of his assignment, he served as a patrolman and obeyed the orders of the board, protesting against this compulsory service, and against his reduction in rank and salary from that of a captain.

While a captain of police in Long Island city, he was entitled to receive a salary of $1,800 a year, and his right to that rank, office and salary was judicially determined by a judgment rendered on November 1, 1899, in an action brought in this court by the plaintiff against the defendant, to recover such salary for the period from November 12, 1897, to January 1, 1898.

During the time of his service upon the police force of the city of New York, he received compensation as a patrolman at the rate of $1,000 a year. The result of the action of the board, therefore, was not only to degrade him from the rank of a captain to that of a patrolman, but also to reduce his salary from $1,800 to $1,000 a year.

This action is brought to recover the difference in salary as a patrolman and that of a captain on the police force of the defendant, to which plaintiff claims her intestate was entitled by law, and hence of right, for the reason that his rank of captain in the police force of Long Island city, at the time the Greater New York charter came into effect (January 1, 1898), was continued in the police of the greater city, and that the board of commissioners of police of the defendant had no power or authority, under the charter, to reduce him therefrom.

The defendant makes but a single defense, and urges nothing on the submission hereof, other than that, pursuant to section 281 of the charter (Laws of 1897, chap. 378), the board had power "to fix and assign the rank, title, duties, powers and place of service" of the members of the police forces of the several municipalities consolidated, and that its assignment of Buschmann to the position of a patrolman is a conclusive answer to the plaintiff's claim in this action.

Section 279 of the charter provides: "The lawfully appointed captain, sergeant and patrolmen of the police force of Long Island City, who shall be such when this charter takes effect, shall be members of the police force, specified in section two hundred and seventy-six of this act."

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The police force of Long Island city was constituted and existed by virtue of chapter 5 of the act entitled "An act to revise the charter of Long Island City" (Laws of 1871, ch. 461), as amended by Laws of 1893, ch. 645.

A careful reading of the Greater New York charter, and particularly of chapter VIII thereof, which creates the police department (§ 270 *et seq.*), shows that the consolidation of the police forces of the several municipalities was intended to be made so that existing rank and grade should be continued; except only, that where a policeman had been, prior to consolidation, acting in a rank, by a title and with duties and powers at variance with those named and specified in the new force created by the charter, the board might, by virtue of section 281, cause him to be brought into conformity therewith.

The police forces of the several consolidated municipalities were established under charters and statutes varying in their terms in respect thereto, and the necessity for the exercise of the powers conferred by the section last cited, for the reasons above stated, is apparent from the reading of the several enactments.

The charter has conferred no power upon the board to reduce any member of the police force in rank, whether transferred or appointed, and its powers, control and authority over the police forces transferred, and over their tenure of such membership, and removal therefrom, is declared by the section last cited to be the same as the said board should have over the members of said force appointed thereto by said board.

The practical interpretation of section 281, made by the board of police commissioners in this case, that Buschmann, a captain, could at will, and by a mere resolution, be reduced to a patrolman, logically results in the somewhat startling proposition, that, in like manner, a deputy chief, an inspector, any other captain, a sergeant or a roundsman transferred from any of the consolidated municipalities may be reduced to an inferior rank, even to that of a patrolman. That such was not the intention of the Legislature is also inferable from section 287, relating to first appointments under the charter, that "the captains of police shall be selected from, first, the captains, and, second, from the sergeants of the respective police forces transferred by sections 277, 278, 279 and 280 of this act," and from

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section 288, relative to promotions, that "Sergeants of police shall be selected from among patrolmen assigned to duty as roundsmen, as provided by section 292 of this act; captains from among the sergeants; inspectors from among the captains; deputy chiefs of police from among inspectors and captains; and chief of police from among deputy chiefs, inspectors and captains."

Such practical interpretation by the board is also negatived by section 283, relating to salaries, that "The salary or compensation of any of such members of the said police force as are specified in sections 277, 278, 279 and 280 of this act, as the same is lawfully fixed at the time this charter takes effect and immediately prior thereto, shall not be decreased."

It is further negatived by section 299 relative to salaries of officers and members of the force, and their grade based upon their years of service respectively, wherein it is declared, among other things, that the annual salary or compensation of each captain of police shall be $2,750; that "All other patrolmen or policemen of the various police forces consolidated into a single force by the provisions of this act, shall belong, so far as pay or compensation is concerned, to the grade indicated by the pay or compensation which they are respectively receiving on January first, eighteen hundred and ninety-eight. But nothing in this section contained shall be construed to affect in any other way the rights and privileges secured under the provisions of this act to the members of the various police forces consolidated into a single force by this act. * * * Any member of the forces so transferred not a member of the New York police force prior to January first, eighteen hundred and ninety-eight, whose salary falls between two grades, shall receive the salary of and be assigned to the grade next above the salary he is receiving at the time of transfer. Salaries of all officers in the forces so transferred, other than officers in the New York police prior to January first, eighteen hundred and ninety-eight, shall be equalized on the same basis. If the difference in pay is not more than fifty dollars, the pay shall be equalized at once. If the difference is more than fifty dollars, the pay shall be made uniform within three years by equal annual additions."

From the foregoing, I am clearly of the opinion, and have reached the conclusion, that the action of the board of police

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commissioners in denying to Buschmann his rank as a captain of the police force of the city of New York, was an assumption of power and wholly unwarranted by law; and that the plaintiff, as administratrix, is entitled to recover from the defendant, his salary as a captain, from January 1, 1898, to October 8, 1898 (the date of his death), less the amount received as pay of a patrolman for the period, and two per cent. of such salary to be deducted for the police pension fund as provided by subdivision 10 of section 353.

Counsel for the defendant has cited People ex rel. Baldwin v. York, 44 App. Div. 539, and People ex rel. Allen v. York, 48 id. 611, as conclusive authorities in support of his contention. These cases were before me at Special Term, and the learned Appellate Division affirmed the orders made in the first instance, holding, by implication, if not in words, in the opinions handed down, that the language of section 281 was broad enough to admit of the action of the board, which is challenged here. That question was not presented or considered at the Special Term; the assignment of Baldwin and Allen having been made by the board, in obedience to a writ of mandamus in each instance, in which assignment the relators respectively acquiesced for about one year before asserting their claim to superior rank; and this fact, and the other reasons set forth in the several opinions written at the Special Term were there regarded as decisive.

It would seem that the question deemed controlling by the learned Appellate Division in the cases cited had not been fully presented to that court, and that the sections corelative to section 281, hereinabove referred to and considered therewith, had not been brought to its attention.

I am not unmindful of the doctrine of *stare decisis*, yet, with due deference to what has been written by the eminent jurists in the Baldwin and Allen cases, I am impelled to the conclusion reached in the case at bar, for the reasons hereinabove expressed.

Judgment should, therefore, be entered in favor of the plaintiff against the defendant, for the sum of $737.56 (being for 246 days' service, at $2,116.66 per annum, less two per cent. for police pension fund and $660.46 paid), with interest, and costs.

Judgment for plaintiff, with costs.

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THE PEOPLE ex rel. THOMAS J. McGRAW, Relator, v. P. J. SCULLY, City Clerk of the City of New York, Respondent.

(Supreme Court, Queens Special Term, July, 1901.)

New York city — A deputy city clerk thereof may be summarily removed — Civil Service — L. 1892, ch. 681, § 9; 1897, ch. 378, §§ 31, 32, 33, 1543; 1899, ch. 370, § 21.

The city clerk of the city of New York may summarily remove and discharge a deputy city clerk, appointed as such and assigned to the borough of Queens, although the deputy, being alone in the office, did all its work, general and clerical, performed all its other duties and was made by the city clerk caretaker of the records and papers of that particular office.

The deputy does not by the performance of these duties become a clerk entitled to the protection of the civil service regulations but remains at all times a deputy and, as such, is not protected from summary removal by any statute, even though he be an exempt fireman.

MOTION for a peremptory writ of mandamus.

Mayer & Gilbert (Julius M. Mayer, of counsel), for relator.

John Whalen, Corporation Counsel (Louis H. Hahlo, of counsel), for respondent.

GARRETSON, J. It is admitted that the relator was appointed by the respondent a deputy city clerk of the city of New York, on February 16, 1898, pursuant to section 33 of the charter (Laws of 1897, chap. 378), and that he duly qualified as such by taking the oath required by law. He was assigned to duty in the borough of Queens, and continued in charge of the city clerk's office in that borough until March 1, 1901, when he was notified by the respondent that his services would be no longer required. In other words, the respondent summarily removed him from office.

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The relator challenges the respondent's right and power so to remove him, upon two specific grounds — first, that he was an exempt fireman of Long Island City, and, second, that his duties were those of a regular clerk. Neither of these objections will be found to be available to the relator if he was not protected in his office by section 1543 of the charter, which provides that no regular clerk shall be removed until the true grounds for removal have been entered upon the records of the department, and he has been allowed an opportunity of making an explanation thereupon, and the reasons for his removal have been filed in the department; and by section 21 of the Civil Service Law (L. 1899, ch. 370), which provides that no person holding a position by appointment, or employment in one of the cities of the State, who shall have served the time required by law in the fire department of any city, shall be removed from such position or employment, except for incompetency, or misconduct, shown after a hearing, and upon due notice upon stated charges.

While it appears that the relator discharged many duties which might have been performed by a subordinate employee, the fact that such duties were devolved upon him arose from the circumstance that he was in charge of the city clerk's office in the borough of Queens without an assistant, and hence, of necessity, did all the work, both general and clerical, as was from time to time required. He was, however, none the less a deputy, for he was in terms appointed as such, and possessed the powers incident to the office. The section of the charter (33), by virtue of which he was appointed, has made a distinction between deputies and clerks, in that it says — speaking of the city clerk — "he may appoint such deputies or clerks as are necessary to the discharge of his duties, provided that the aggregate salaries of such deputies and clerks, * * * shall not exceed in any one year the sum appropriated therefor in the annual budget." And, in the Public Officers Law (Laws of 1892, ch. 681, § 9), it is provided: "If there is but one deputy, he shall, unless otherwise prescribed by law, possess the powers and perform the duties of his principal during the absence or inability to act of his principal, or during a vacancy in his principal's office. If there be two or more deputies of the same officer, such officer may designate, in writing, the order in which the deputies shall act, in case of his absence from the

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office or his inability to act, or in case of a vacancy in the office, and if he shall fail to make such designation, the deputy longest in office present, shall so act." So that the general powers and duties of a deputy city clerk of the city of New York are those above set forth, subject to the designation, in writing, of the order of their precedence if more than one, and also subject to the qualifying effect of section 31 of the charter prescribing the rights and powers of the city clerk's "first deputy."

The section of the charter last cited, and section 9 of the Public Officers Law quoted above, may and should be read together.

The relator also refers to section 32 of the charter as tending to sustain his contention that he was a regular clerk, which section provides that the city clerk shall be the custodian of all the muniments, records, patents, deeds, minutes, writings and other papers belonging to any of the municipal and public corporations formerly existent therein, and united and consolidated into the city of New York, and shall have power to appoint a clerk in each of the boroughs who shall have charge of the same, subject to the direction and control of said city clerk, and of the municipal assembly.

The facts show, however, that the relator did more than have charge of the records and papers referred to; that he also performed duties under the naturalization laws and other duties which are devolved by law upon the city clerk.

There is no valid reason why the city clerk, in his discretion, should not make one of his deputies a caretaker of such records and papers in connection with the duties of his deputyship, or otherwise prescribe, or limit the nature and character of the services of his representative.

Having reference anew to section 21 of the Civil Service Law, it is found that the protection there given to exempt firemen in the tenure of their official positions, does not apply to a private secretary, or deputy of any official or department, or to any person holding a strictly confidential relation to the appointing officer. As to incumbents of such positions, they are removable at the will of their principal, without notice and without assigning cause therefor.

For the reasons above assigned, I have reached the conclusion that the relator was, in law and fact, a deputy of the respondent; that no issue of fact is raised by the petition and return

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which calls for the issuance of an alternative writ of mandamus; that the relator is not entitled to the peremptory writ, and that the motion therefor should be denied, but without costs.

Motion denied, without costs.

ROBERT L. CUTTING et al., Plaintiffs, *v.* THE BALTIMORE & OHIO RAILROAD CO. et al., Defendants.

(Supreme Court, Richmond Special Term, July, 1901.)

Implied trust — For the minority arising out of a foreclosure instigated by the majority stockholder — Consideration — Equities in the absence of actual fraud.

Where a controlling majority stockholder in and the guarantor of the second mortgage bonds of an insolvent rapid transit company failed to pay the interest on the bonds from lack of proper resources and, upon a premeditated foreclosure and sale resulting from the default, bought the property in nominally by a new company, took all the new stock and, in lieu of paying the purchase price, issued bonds of the new company for those foreclosed, it was held that because of the irregularity of the transaction an implied trust in the new stock arose in favor of the minority stockholders to the extent of their interest in the old stock, and this notwithstanding the trifling value of that stock.

But that, as no actual fraud was shown, the minority, to entitle themselves to the new stock, must within twenty days pay the majority stockholder their *pro rata* share of certain moneys it had paid, after the judgment in foreclosure and before the sale therein, for interest on the bonds foreclosed and, further, that the majority stockholder had as against them a lien for unsecured and unpaid advances theretofore made by it to the rapid transit company and also a lien for income bonds of the latter company which the majority stockholder held at the time of the judgment in foreclosure, and that, to secure this lien, the minority stockholders must deposit their new stock with the majority stockholder and pledge it.

ACTION to impress a trust in favor of minority stockholders.

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Blair & Price, for plaintiffs.

Guthrie, Cravath & Henderson, for defendants.

MAREAN, J. The defendant was owner of the majority of the stock (fifty-one per cent.) of the Staten Island Rapid Transit Railroad Company, and was in control. It had also guaranteed the second mortgage bonds of that company. As guarantor, it had no duty touching the payment of the interest toward minority stockholders; its only obligation in that regard was toward holders of the bonds. It was only as majority stockholder that it owed to minority stockholders any duty to pay the interest, and that duty was conditioned upon the possession in the assets of the company of the requisite funds.

The defendant was also a creditor without security of the said company for a large sum presently due, and while, had defendant chosen, it could, by making default in other directions, have probably paid the interest falling due July 1, 1898, and so have prevented foreclosure, the assets of the company did not, without default elsewhere and without defendant's foregoing its own right of payment of its claim, afford the means of paying such interest. The defendant allowed such interest to go unpaid and actively instigated the foreclosure, based upon the default, with the purpose and intent of becoming the purchaser at the sale.

After the entry of the judgment of foreclosure, defendant, out of its own funds, paid the interest falling due July 1, 1898, January 1, 1899, and July 1, 1899, and thereupon a sale under the judgment was had indirectly, but really, to defendant, the nominal title being taken by a new company, to wit, the Staten Island Rapid Transit Railway Company, defendant taking all the stock, and in lieu of payment of the purchase money the foreclosed bonds were then taken up in exchange for a new issue of the same amount by the new company, bearing interest from July 1, 1899, at four per cent.

Under these circumstances, the defendant holds forty-nine per cent. of the stock of the new company in trust for the minority stockholders of the old company. At one time, I entertained some doubt whether the substantial want of value of the old stock did not lead to a contrary conclusion. But I think not. The

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minority stockholders were entitled to whatever chances of value their stock might have in the vicissitudes of the future, and in the most desperate chance there is probably a fractional certainty, however attenuated. But the lack of substantial value is a material fact when the ethical character of defendant's conduct comes to be considered in determining how it shall be treated in connection with the enforcement of the trust. The Staten Island Rapid Transit Railroad Company was hopelessly insolvent. Beyond the first and second mortgages, amounting to $3,500,000, it had outstanding an issue of income bonds amounting to $4,500,000, upon which the company had never been able to pay a penny of interest. Two million, three hundred and thirty-two thousand dollars of this issue were held by defendant. Besides, the company was indebted to the defendant on open account, as above mentioned, to the amount of $1,174,032.60. The company had never paid a dividend. It is urged by plaintiff that the income bonds were void, but, each stockholder having accepted his *pro rata* share of the issue, they are all estopped. Only creditors could have questioned their validity. There is no reason to suppose that the defendant saw any actual value in the property loaded down with these incumbrances, and desired to obtain it for that reason. It is more than probable that it apprehended a necessity, in order to put it upon anything like a solvent basis, to forgive its own outstanding account, and that all the holders of income bonds would have to forgive their claims. But they could not control the income bonds which they did not hold, and why should they forgive their own claims against the company for the benefit of minority stockholders? I am satisfied that, while the defendant was technically wrong in the course which it took to bring about the inevitable liquidation, and that equity will, therefore, imply a trust, that, nevertheless, it will impose equitable conditions and not apply those harsh and punitive rules which are appropriate to cases of actual wicked fraud?

The plaintiffs are entitled to a transfer of the same number of shares of the new company as they hold of shares in the old company upon payment, within twenty days, of their *pro rata* share of the moneys paid by defendant, as above stated, for interest on the second mortgage bonds, subject, however, to defendant's lien for the payment of plaintiffs' *pro rata* share of the income bonds held by the defendant, as above stated, and of

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the defendant's open account aforesaid, such lien to be secured by pledge with the defendant of the stock transferred.

But, in case the plaintiffs shall not, within twenty days after the entry and service of an interlocutory judgment for the above relief, make the said cash payment, then the complaint will be dismissed, with costs.

The following simple case illustrates the view which I have taken. Suppose A, who is insolvent, owns a piece of real estate subject to a mortgage, having no other property, and B holds a second mortgage upon it for an amount, without any reasonable doubt, largely in excess of the value of the equity. A goes abroad, leaving B in charge of the property as general agent. B's mortgage falls due and his interest is in arrears. The income is insufficient to pay interest on the first mortgage unless bills for repairs are allowed to go unpaid, and unless B foregoes his own interest and principal. B pays the bills for repairs and pays his own interest, but allows the interest on the first mortgage to be in default, and instigates a foreclosure and buys at the sale, which is a fair public sale, in his own name, for just the amount due on the first mortgage and costs, his second mortgage being nominally cut off. Equity probably impresses a trust upon the property in B's hands for the benefit of A, though the end reached was the same as would have been reached by a foreclosure of B's own mortgage, but must not A pay B what B paid at the sale, and must he not take the land allowing in some way a lien for the amount due on B's second mortgage? (So adjusted, of course, that it will be a lien only after an amount equal to the old first mortgage.)

The plaintiffs' proposition is that in the case supposed B must lose his second mortgage altogether and that A, instead of merely getting back his own, will make a profit. I think equity gives him only indemnity.

Judgment accordingly, with costs. Costs against plaintiffs are awarded to defendants Lewis, Staten Island Rapid Transit Railway Company and Standard Trust Company.

Ordered accordingly.

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FRANCIS A. FOSTER, Plaintiff, v. THE VILLAGE OF SOUTH GLENS FALLS, Defendant.

(Supreme Court, Saratoga Special Term, July, 1901.)

Right of pasturage — When it is a mere privilege.

A clause contained in a deed giving the grantee a right to pasture certain lands of the grantor lying between the premises granted and the Hudson river, accompanied by a proviso that if, at any time, the grantee required a fence on those lands the right of pasturage should cease, is a license personal to the grantee and does not run with the lands.

Whenever an easement or an appurtenance is not an essential and necessary adjunct to the lands conveyed its scope will be limited.

ACTION to enforce an alleged right of pasturage.

E. T. Brackett, for plaintiff.

Ashley & Williams (T. W. McArthur and Henry W. Williams, of counsel), for defendant.

RUSSELL, J. On the 10th day of September, 1867, James Morgan and others were owners of a farm of 180 acres in the town of Moreau, Saratoga county, and of a strip of land, now partially occupied by the defendant for reservoir purposes, lying between the farm and the Hudson river. On that day the owners conveyed the farm to Martin Coffin, by deed, containing this clause: "With the right to pasture the lands between these premises and the river, but if at any time the party of the second part requires a fence on the lands the right of pasturing ceases." Coffin afterwards conveyed to William Griffin and Griffin to Daniel T. Wetsel, both deeds containing the same reference to the right of pasturage. The plaintiff is the heir of Wetsel and claims that the defendant by increased flowage has seriously disturbed her right of pasturage, but does not claim that this flowage in any way extends upon the farm of which she became so possessed.

At the time of the deed to Coffin the pasturage was of some

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value to the adjacent farm, and the lands between it and the river of little worth, the herbage being then and since somewhat scanty, and the water of the river unnecessary as the farm was reasonably well supplied for that purpose. The parties contracted with reference to the situation as it then existed, and looking to the immediate future, without apparent thought as to what might be the legal rights of others taking adverse titles at a distant period to the two pieces of land, which might be useful and valuable for very different purposes beyond the contemplation of these dealing with each other in the year 1867. The very terms of the reservation imply the personal character of the license, and negative the idea that the pasturage right would go, by conveyance of the farm to stranger hands, at a time when Coffin's present occupation of the lands as a farm would have ceased forever. It was he who might require a fence, which was probable, if he allowed cattle to roam upon his farm so that they would not pass to the other lands, and the suggestion of this cessation of the privilege indicates the indefinite character of the right, and its dependence upon the personal choice of Coffin himself, and not that of the future possessor of the farm lands which might be used for very different purposes. The fitful use of the lands between the farm and the river for pasturing, by those occupying the farm, indicates the small value placed upon the privilege, and the current acts of the owners of the farm from 1867 to 1894 tends to confirm the theory that it was not intended as a permanent grant of an appurtenant use of the other lands.

The theory of the law forbids the unlimited suspension of title to an interest in lands, and construes the terms of a grant in conformity with such theory. Wherever an easement or an appurtenant is not an essential and necessary adjunct to lands conveyed, its scope will be limited. Hence a reservation, that the grantor should have the privilege of mowing and cultivating the surplus ground of a strip of ground not required for railroad purposes, was held to be reserved to the grantor personally and not as owner of the farm. Pierce v. Keator, 70 N. Y. 419.

A covenant not to permit a grist mill to be erected does not run with the land but is a personal contract only. Harsha v. Reid, 45 N. Y. 415.

The surrounding circumstances, the situation of the parties and the subject of the contract guide in the determination of

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the intention of the parties in the conveyance of lands. French v. Carhart, 1 N. Y. 96.

I am of the opinion that the grantors Morgan and others did not intend to convey to Coffin, in addition to the farm, a perpetual encumbrance upon their other lands, and that the language of the privilege granted did not go beyond their real intent.

Judgment for defendant, with costs.

LEAR JAGER, JR., Plaintiff, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, Kings Special Term for Trials, August, 1901.)

Measure of damages — For market garden lands deprived of natural water by the Brooklyn pumping system — Injured person must make the loss as small as possible.

An owner of four and one-half acres of land in Kings county, provided by him with ditches securing a degree of moisture proper for market gardening, is not and cannot be entitled to recover $20,000 for seven years' loss of crops, caused as alleged by the installation in 1894 of the driven well system of the former city of Brooklyn; nor, where his crops have thereafter annually failed to mature, is he justified in continuing to put them in and then seek to make the city of New York, after consolidation, pay him the accumulated loss.

Upon the proof the court awarded $1,200 damages for loss of crops and refused an injunction.

ACTION to recover damages for diversion of underground waters by driven wells operated by defendant. (See Forbell v. City of New York, 164 N. Y. 522.)

Charles Coleman Miller, for plaintiff.

John Whalen, Corporation Counsel (R. Percy Chittenden, James W. Prendergast, Jr., of counsel), for defendant.

CHESTER, J. There is one fact in this case which distinguishes it from cases of a like class, so far as I can judge, from the opinions that have recently been handed down by Justice Gaynor in Westphal v. City of New York (34 Misc. Rep. 684), and by Justice Marean in Reisert v. City of New York (35 Misc. Rep. 413),

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and that is, that the plaintiff here has built a system of drainage canals or ditches upon his farm leading to Spring creek, which, before the installation of the driven well plant of 1894, kept his lands from being too wet for successful market gardening, yet drained the water under his land only to such a level that his crops received substantial aid from it by capillary attraction.

Notwithstanding this, his claim for damages is exaggerated. It amounts to about $20,000, upon a farm of four and a half acres, for the period of seven years. He gives the only evidence as to the amount of the crops he claims to have been destroyed. It is largely indefinite and uncertain. He kept no accounts except that he had some memoranda covering a limited period after he commenced his action. His evidence tends to inflate his damages beyond reason and beyond belief. After the first year or two he knew the effect upon his crops of the loss of the underground water, yet he kept on year after year putting in crops only to have them, according to his testimony, practically a total failure in coming to maturity. I think he was not justified in accumulating damages in this way. He should have done what he reasonably could to avoid them.

Giving the fact in relation to his system of drainage such weight as it is fairly entitled to; giving credit to such of his testimony as is worthy of belief, and giving force to the doctrine of avoidable consequences, which, I think, should be applied to this case, I assess his damages at the sum of $1,200, without further discussing the voluminous testimony on that subject. Judgment for that amount may be entered, with costs. No injunction is awarded and the question of fee damages is not considered.

Judgment accordingly.

HENRY A. EPISCOPO, Plaintiff, *v.* THE MAYOR, etc., of the City of New York et al., Defendants.

(Supreme Court, New York Special Term, August, 1901.)

Municipal contract — City cannot forfeit it where the city is in default — Condition against assignment — Stipulation.

Where a course of dealing between a city and a contractor with it has established a practice of the city's measuring up his work

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monthly, certifying to it and paying seventy per cent of it in the succeeding month, the city cannot, where the contractor is proceeding properly, delay measuring up the work, neglect to make him the usual monthly payment within the month necessary to enable him to continue the work, and thereafter declare the contract abandoned for his unnecessary delay. In such case the contractor is, without further performance, entitled to recover of the city the entire amount he had earned up to the time of the city's breach.

A clause in such a contract forbidding assignment of it unless the commissioner of street improvements consents thereto in writing is to be considered as one for the city's protection against an assignee, and is available to it only and only when pleaded by it.

Therefore, where the contractor took an assignment of the whole contract from his former partner therein and thereafter assigned the thirty per cent, held in reserve by the city, to a bank as collateral security for his own discounted note, the court considered the clause inapplicable to a case in which it had already found that the reserve belonged to the contractor, and it further held that the assignment to the bank, being prior in time to certain other liens filed, entitled the bank to a preference to the extent of the moneys assigned.

A stipulation of attorneys for lienors as to the distribution of the surplus, remaining after the bank had been paid, should be given effect.

ACTION to foreclose mechanics' liens.

Hawes & Norman, for plaintiff.

John Whalen, Corporation Counsel (Chase Mellen, of counsel, for defendant Mayor.

Charles W. Dayton (L. Laffin Kellogg, of counsel), for defendant Twelfth Ward Bank.

J. Woolsey Shepard, for defendant Armbrust.

Otis & Pressinger, for defendant Rand Drill Co.

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Douglas Mathewson, for defendant Bellotti.

Charles L. Livingston, for defendant McBride.

Bullowa & Bullowa, for defendant Simoni.

Dutton & Kilsheimer, for defendants Cameron & Morrison.

Joseph P. O'Neill, for defendant Sullivan.

Earley & Prendergast, for defendant Bell.

Lyman L. Settel, for defendants Hudson and others.

Alex. U. Mayer, for defendants Maio and others.

Richard Stackpoole, for defendants Raymond & Co.

George W. Stephens, for defendant Stevens.

R. Hickox, for defendant Vaught.

CHESTER, J. This is an action brought to foreclose three mechanics' liens filed by the plaintiff, as assignee of a large number of laborers who performed work under a contract made May 25, 1897, between the city of New York and the firm of J. P. Armbrust & Co. for the construction of what is known as the Williamsbridge sewer. This firm was composed of James P. Armbrust and Hugh J. Reilly. Notices of these liens were filed in November, 1897. About the same time a number of notices of other liens were filed by parties who had performed work or furnished materials required by the contract upon the sewer in question. These are made parties defendant as well as the contractors, the city of New York and the Twelfth Ward Bank.

On the 13th day of July, 1897, Reilly & Armbrust entered into an agreement dissolving their copartnership. Under this agreement the sewer contract was assigned to Reilly in consideration of the payment to Armbrust of $1,800 out of the first payments he received from the city on account of the performance of the contract, and the further sum of $5,000 out of the final payments which may be found due upon the completion of the contract.

On the 15th day of July, 1897, the Twelfth Ward Bank dis-

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counted Reilly's note for $7,000 and took as security an assignment from him of all moneys then due, or thereafter to grow due, to the extent of $7,000 upon the reserve of 30 per cent. provided for in the contract between the city and Armbrust & Co. The $7,000 was paid by the bank to Reilly, who in turn paid $1,800 of it to Armbrust in part payment of the consideration of the contract of dissolution, and the balance of $5,200 was used by Reilly in work upon the sewer.

The moneys paid by the city under the contract were received by Reilly, but were receipted for by both contractors. In form, at least, so far as the city was concerned, the work was carried on in the name of the firm the same as if there had been no dissolution of the copartnership. Reilly prosecuted the work under the contract until about the 25th day of October, 1897. Soon after that the commissioner of street improvements of the Twenty-third and Twenty-fourth wards, who had charge of this contract on behalf of the city, declared the contract abandoned and served notices upon the contractors to that effect and directed them to discontinue all work thereunder. A new contract, aggregating about $6,100 increase in the cost, was thereafter let to another contractor, who completed the sewer. Other facts connected with this somewhat complicated controversy will be mentioned in discussing the legal principles involved.

The first question to be determined is whether or not there are any moneys due and payable from the city under its contract with Armbrust & Co. for work performed in the construction of the sewer, and if so, as connected with that question, how much? As related to this, the question is presented whether or not the city lawfully declared the contract abandoned and lawfully prevented Reilly from completing performance of it.

The contract contains the following clause:

"(F) And the said party of the second part further agrees that if the work under this agreement shall be abandoned, or if at any time the Commissioner of Street Improvements of the Twenty-third and Twenty-fourth Wards shall be of the opinion, and shall so certify in writing, that the said work, or any part thereof, is unnecessarily delayed, or that the said contractor is willfully violating any of the conditions or covenants of this contract, or executing the same in bad faith, or if the said work be not fully completed within the time stipulated therefor, he shall have the power to

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notify the aforesaid contractor, by a written notice to be served upon the contractor, either personally or by leaving said notice at his residence or with his agent in charge of the work, to discontinue all work or any part thereof, under this contract; and thereupon the said contractor shall discontinue said work, or said part thereof, and the said commissioner shall thereupon have the power to readvertise and relet the work by contract, in the manner provided by law, or to work at and to complete the work herein described or said part thereof, and to charge the expense of such completion to the aforesaid contractor; and the expense so charged shall be deducted and paid by the party of the first part out of such moneys as may be then due or may at any time thereafter grow due to the said contractor under and by virtue of this agreement or any part thereof; and in case such expense shall exceed the sum which would have been payable under this contract, if the same had been completed by said contractor, he will pay the amount of such excess to the parties of the first part; and in case such expense shall be less than the sum which would have been payable under this contract, if the same had been completed by said contractor, he shall forfeit all claim to the difference."

The claim is made, on the part of those having interests adverse to the city, that, at the time the city assumed to declare the contract abandoned, it was itself in default to the contractors, because of the non-payment of the moneys then due to them, and that until such default was cured it had no lawful right to declare the contract abandoned, or to interfere with the prosecution of the work under it. It is clear that, if the city failed or refused to make payments when payments were due, it was guilty of such a breach of the contract as would serve to forfeit its rights to give the notice of abandonment which it did, and the rights of the parties became fixed as of the date of such breach. Graf v. Cunningham, 109 N. Y. 369; Wright v. Reusens, 133 id. 298, 305; Kingsley v. City of Brooklyn, 78 id. 200.

The contract provides "that the return of the engineer shall be the account by which the amount of materials furnished and the work done shall be computed." It also provides that "In case the amount payable under this contract shall be $5,000 or over, payments will be made to the said party of the second part * * * by monthly installments of 70 per cent. on the amount

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of work performed, and also on the quantity of materials furnished and delivered should the Commissioner of Street Improvements of the Twenty-third and Twenty-fourth wards deem it advisable so to do, in which case, however, the quantity returned shall be such that the amount paid will be fairly due and in accordance with the provisions and stipulations of this agreement; provided the amount of work done on each installment shall not be less than $1,500."

The moneys payable under this contract largely exceeded the sum of $5,000, and during the progress of the work the amount of work done each month, as appears by the certificates of the engineer, largely exceeded $1,500. It appears that three certificates for seventy per cent. payments, under the foregoing clause, were given by the chief engineer, certified as correct by the commissioner of street improvements, and paid as follows:

No. 1, dated July 6, 1897, for $5,634.44, paid July 29, 1897.

No. 2, dated August 6, 1897, for $4,495.51, paid August 30, 1897.

No. 3, dated September 7, 1897, for $5,510.65, paid September 25, 1897.

It appears from these certificates and the testimony that, down to October, the course of dealing between the city and the contractors was that the work for the prior month was measured and certified about the sixth or seventh of the following month, and the seventy per cent. payments made during the last week of the month in which the measurements were made. While there was nothing in the contract which fixes the time when the city was to make the seventy per cent. payments, except that they were to be made monthly, and while they were to be made provided the commissioner of street improvements should deem it advisable so to do, yet, after the city and the contractors had acquiesced for months in a course of dealing under the contract fairly within its terms, whereby the latter had received certificates the first week in the month for seventy per cent. of the prior month's work, and had invariably received payment therefor in about twenty to twenty-five days thereafter, it would, I think, be unreasonable for the city to be permitted, arbitrarily or without just cause, to withhold certificates or payments for a much longer period, thus depriving the contractors of funds, which, in the absence of other means, were requisite to their going on with

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the work. There can be no justice in permitting a contract to be declared abandoned, and the moneys payable thereunder forfeited, because of alleged failure to promptly perform the contract, when the only cause for ceasing work was the failure to promptly pay the contractors moneys due to them from the party so declaring and claiming the forfeit, and which moneys they had the right to have, and which were essential to enable them to hire men and purchase material necessary to the prompt performance of the contract.

A fourth seventy per cent. certificate was given, dated October 7, 1897, for $3,234.13, which covered work done and materials furnished subsequent to the giving of the third certificate. The last certificate, as well as the three former ones, each recited that the work and materials mentioned therein had been performed and delivered as required by the contract and in a satisfactory manner, and that the moneys mentioned therein were justly due. These moneys being due, the contractors were entitled to receive them with reasonable promptness after the issue of the certificate. This certificate No. 4 was forwarded by the commissioner of street improvements to the office of the comptroller, where it remained for some time. While there, a demand was made for its payment upon the comptroller, and also upon the commissioner, but it was not paid. The commissioner recalled the certificate from the comptroller by a letter dated November 6, and received at the comptroller's office November 10, 1897. By letter dated November eleventh, and received at the comptroller's office November eighteenth, the comptroller was notified by the commissioner that he had declared the contract abandoned.

Mr. Reilly testified that he had continued the work down to the month of October, 1897, regularly, without complaint; that he made payments for labor on the 20th of the month, but changed it to the 25th on account of the slowness of payments by the city; that the last payment he received was for the August work, and that he got that about the 25th of September, 1897; that he wrote to the commissioner between the 5th and 8th of October, 1897, that if he did not get his money before the twenty-fifth of the month, and did not get the measurements, he would have to stop work; that the pay was to be on the twenty-fifth of the month, and that he wanted the money to pay off the men for September; that he did not get any reply to that letter, and did

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not get his pay for the month of September; that he stopped his work on the twenty-fifth of October; that the only reason he stopped was that the city had neglected to pay him his money, and that if he had received his money every month he would have been able to complete his contract. He also said that the engineer did not come to measure his work for September until the eighth or tenth of October. The city furnishes no evidence in denial of these statements. No sufficient reason has been furnished by the city for its failure to make the payment under the fourth certificate, nor for the failure to make measurements promptly. Nor can I find in the evidence any reasonable justification for the act of the commissioner in declaring the contract abandoned, even though the city was not in default at the time. It was claimed upon the trial, upon behalf of the city, in justification of its course, as appears from the testimony of the chief engineer in the department of street improvements in the twenty-third and twenty-fourth wards, that he visited the work about September 22, 1897, and that he saw only eight or ten men employed on the contract at the time, but he did not go down in the trenches. On the contrary, it appears from the testimony of the plaintiff, who was a superintendent for Reilly upon the work, in which he was corroborated by the original time-book kept by him, that, on September 22, 1897, there were eighty-three men, besides two teams and teamsters, employed, and about that number for some days thereafter, and that many of these were employed at the bottom of the sewer, where they could not be seen from the surface of the ground, leaving only eight or ten men visible above ground. He also said that there were, approximately, 167 to 169 men working there under Reilly in the month of October, 1897, up to the twenty-fifth of that month. The city also put in evidence a letter from Reilly, bearing date October 28, 1897, to the commissioner, as follows: "Your letter regarding our work in Williamsbridge received. We will be prepared to go ahead with the work Monday morning and will do all in our power to push same. Regretting the delay and trusting the above will be satisfactory, I am your respectfully, Hugh J. Reilly, representing J. P. Armbrust & Co."

In view of the attending circumstances, I cannot see that the admission of delay contained in this letter furnishes a sufficient justification for the city, nor that it is a waiver of the default

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of the city in making the payment due. It would seem more correct to assume that it was written with the anticipation, on the one hand, that the moneys due might be paid in time to enable work to be resumed at the time stated, and with the fear, on the other hand, that, if work was not resumed, the city might take the course which it afterwards did, and declare the contract abandoned.

It seems to me clear, from the testimony, that the work was not voluntarily abandoned by the contractors, and was not lawfully or rightly declared abandoned by the city. If I am correct in this conclusion, the question is presented as to how much the city should pay by reason of its interference with the work. It is well settled that, when a breach of contract of payment is made, the contractor is entitled, as damages, to at least the entire amount earned under the contract at that time without further performance. Jones v. City of N. Y., 47 App. Div. 39; 57 id. 403.

On this basis, the following is a statement showing the amount earned under the contract at the time, viz:

Amount earned and certified by first three certificates	$22,343 72
Amount earned and certified by certificate No. 4, which was withdrawn	4,620 18
To this should be added work done after October 7, 1897, which was measured, but not certified, as appears by the testimony of Engineer Fitch, employed in the department of street improvements, to the value of	4,320 49
Total	$31,284 39
From this should be deducted the payments made under the first three certificates	$15,640 60
Leaving a balance due of	$15,643 79

To which should be added interest from the date of the service of notice that the contract was declared abandoned, November 11, 1897.

The next question is the one arising between the Twelfth Ward Bank, the various claimants of liens upon the fund and the city

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as to the validity of the assignment to the bank to secure Reilly's note. The assignment antedates the filing of any of the notices of liens, and, being prior in point of time, the bank is entitled to the preference to the extent of the moneys assigned, unless the assignment itself is, for some reason, invalid. Fortunato v. Patten, 147 N. Y. 283; McKay v. City of New York, 46 App. Div. 584.

Those opposed to the claim of the bank invoke the following provision of the contract in support of their theory that the assignment is invalid, viz:

"(G) And the said party of the second part (the contractors) hereby further agrees that he will give his personal attention constantly to the faithful prosecution of the said work; that he will not assign or sublet the aforesaid work without the previous written consent of the Commissioner of Street Improvements of the Twenty-third and Twenty-fourth Wards, indorsed on this agreement, but will keep the same under his own control; that he will not assign, by power of attorney or otherwise, any of the moneys payable under this agreement, unless by and with the like consent, to be signified in like manner; that no right under this contract, nor to any moneys to become due hereunder, shall be asserted against the Mayor, Aldermen and Commonalty of the City of New York, or any department, bureau, officer or officers thereof, by reason of any so-called assignment, in law or equity, of this contract or any part hereof, or of any moneys due or to grow due hereunder, unless such assignment shall be authorized by the written consent of the Commissioner of Street Improvements of the Twenty-third and Twenty-fourth Wards indorsed on this agreement."

Neither the assignment by Armbrust to Reilly of the former's interest in the contract nor the assignment by Reilly to the bank received the written consent of the commissioner, evidenced by his written indorsement to that effect upon the contract.

The fact of this omission, if properly pleaded, would undoubtedly serve as a defense to the city to any claim made against it by an assignee of the contract, but here the claim of the bank is not made against the city, but against the thirty per cent. reserve payable under the contract. If these funds do not belong to the city, as has been held, it is a matter of no concern to it what parties are held to be entitled to receive them. More than

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this, the city has not put itself in a position to avail itself of this clause in the contract, because of its failure to plead it as a defense in its answer. Burke v. Mayor, 7 App. Div. 128. Neither can this clause serve as a defense to the various parties claiming liens, for the reason that its sole purpose is for the protection of the city and not of outside parties. That lienors cannot avail themselves of such a clause was decided in the case of Fortunato v. Patten, *supra*.

The Twelfth Ward Bank is, therefore, entitled to be first paid the amount of its note against Reilly for $7,000 and interest out of the thirty per cent. reserve in the hands of the city. The amount earned under the contract being $31,284.39, as above shown, this reserve, without interest, amounts to $9,385.32, which is more than sufficient to pay the claim in full, and which leaves a very considerable surplus applicable to the payment of costs and of other liens and claims.

There remains the question as to the proper disposition of this surplus. In the arguments upon the trial, and in the briefs of counsel, various alleged defects in the numerous liens claimed by the parties and a multiplicity of defenses to each of the several liens and claims were pressed upon the attention of the court, some of which have much force, but they need not be considered, for, since the submission of the case, the attorneys for each of the parties who proved their liens or claims upon the trial, other than the bank, have joined in a stipulation agreeing upon a basis of distribution among them of the moneys which the court may find to be applicable to the payment of such liens and claims, and waiving all objections and exceptions to the other liens or claims filed or proved except to the claim of the bank. The stipulation also contains an agreement as to counsel fees. Neither the city nor the bank is a party to the stipulation. I conceive of no reason why force should not be given to the stipulation, except, possibly, that part of it relating to counsel fees. After the bank's claim is paid in full, it can have no further interest in antagonizing the claim of any other party or in the proportion of the fund paid to either of them. Nor can the city have any such interest. If the conclusion that the amount above stated has been earned under the contract, and has not been forfeited, is correct, it matters not to the city what claimants are held to be entitled to the fund. The contractors cannot complain, as

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the stipulation, except as to counsel fees, agrees to apply the moneys to the liquidation of obligations incurred under the contract. Armbrust's only interest is to save himself from personal liability, and Reilly has not answered. The only objection to the stipulation relating to counsel fees is that the amount agreed upon for counsel to the plaintiff exceeds the amount the court may lawfully grant by way of an allowance of costs. With this exception, and after the payment of the costs and allowances hereinafter mentioned, the surplus may be distributed as provided by the stipulation.

I am unable to gather from the evidence anything upon which a personal liability against the defendant Armbrust can be sustained. The claims of all the parties to this effect against him were withdrawn upon the trial, except on behalf of the plaintiff and of the defendant Raymond, but counsel for neither of these parties has pressed this question in his brief, and I conclude that each has reached the same conclusion in this respect as was announced by the other parties on the trial.

Decision and judgment may be prepared in harmony with this opinion, with costs to the plaintiff, and an extra allowance of $750 in lieu of the amount of counsel fees stated in the stipulation, with costs to the Twelfth Ward Bank and an extra allowance of five per cent. on the amount of its claim, with costs to the defendant Armbrust and an extra allowance of $100, and with an allowance by way of costs to the several parties joining in the stipulation, other than the plaintiff, in the amounts therein stated, in lieu of the counsel fees therein agreed upon, all such costs and allowances to be paid out of the fund. Settlement may be had upon the usual notice.

Judgment accordingly.

FRANK E. WISE, Plaintiff, *v.* SARAH C. CURRY, Defendant.

(Supreme Court, New York Trial Term, August, 1901.)

Marketable title — Deed of a lot on a lane conveys fee to center — Record in partition considered.

In 1851 in an action of partition, in which the decree ordered the making of a map for the sale — which showed the lots and the gen-

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eral boundaries — a referee sold, as the record showed, all the property of an intestate in a certain locality, described in a deed to the intestate made in 1826 as bounded northerly by a road or lane, by the lot numbers on the map and in his deeds the referee described the parcels sold by metes and bounds which coincided with the map but he made no mention of the lane in describing the northern boundary. He made no separate sale of the lane and no claim to it has ever been made subsequently by the intestate's heirs. The lane was subsequently closed by the several owners whose lands it crossed, and was built upon, and a purchaser refused in 1901 to take title to one of these lots upon the ground that his vendor, a mesne grantee under the sale in partition, did not own that part of the lot which was represented by the lane.

Held, that, under the rule of property that a grant of abutting lands conveys the fee to the center of the street or highway and in view of the public record in the action of partition, the fee in the lane to its center passed by the referee's deed and that the title was therefore marketable.

Action to recover moneys paid on account of a contract for the purchase of certain real estate, and expenses of examining title. Counterclaim demanding specific performance.

Ritch, Woodford, Bovee & Wallace (David F. Butcher, of counsel), for plaintiff.

Graff & Blauvelt (William T. Graff, of counsel), for defendant.

Clarke, J. Action to recover moneys paid on account of contract for the purchase of certain real estate in the city of New York, and expenses of examining title. Counterclaim demanding specific performance. Case submitted to the court without a jury upon an agreed statement of facts.

By deed dated September 7, 1826, recorded September 14, 1826, Aaron B. Jackson and Cynthia, his wife, conveyed to Leonard Fisher the following described property: "All those three certain lots, pieces or parcels of ground, situate, lying and being in the 9th Ward of the City of New York, being part or parcel of the late farm of said Richard Somerindike, deceased, and known and distinguished on a certain map or chart thereof, made by Wil-

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liam Bridges, one of the city surveyors, dated 1808, by lots numbers 1, 2, and 3, bounded Easterly in front, on the Bloomingdale Road, 175 feet; Southerly, by Richard Lawrence, 450 feet 2 inches; Westerly, also on the said Richard Lawrence, 163 feet 6 inches; and Northerly, by the road or lane leading from the Bloomingdale Road to Richard Lawrence, 421 feet." The said lane was known as Perrit's or Lawrence's lane, was twenty feet wide and extended to the Bloomingdale road.

It is conceded, and, indeed, under our authorities it could not well be denied, that under said deed and by said description title vested in Fisher to the southerly half of said lane to the center line thereof. Said property was devised to Joseph Fisher, who died intestate in or about the month of March, 1839. In 1850 the heirs of Joseph Fisher partitioned his property in an action entitled Robert H. Cumming and others against Leonard Fisher and others. In the complaint the lots at Bloomingdale were described as above set forth in the deed from Jackson to Fisher, executed in 1826. Such proceedings were thereupon had that on November 24, 1851, an interlocutory decree of partition and sale was made under the direction of Stephen Cambrelling, referee. By the decree, a map of the premises at Bloomingdale was ordered to be made for the purpose of sale. Said map was made and showed the property divided into thirty-two lots, of which 1 to 6 faced on Bloomingdale road, the uneven numbers, from 7 to 31, faced on Seventy-fifth street, and were approximately 102.2 by 25, and immediately adjoining them to the north were the even numbered lots, 8 to 32, each approximately twenty-five feet wide, and diminishing from east to west from about 46.8½ to 23.2 in depth, and all shown as abutting on said lane. Joseph Fisher owned no other property at Bloomingdale than that described in the complaint in said partition suit. The referee, by his report dated January 27, 1852, reported the sale of lots Nos. 27, 28, 29 and 30 to Joseph Cudlipp for $1,040, and of lots Nos. 21, 22, 23, 24, 25 and 26 to James Munson for $1,590. It also shows that he caused due notice of the sale to be published and posted, and that on January sixteenth he caused said several lots, pieces or parcels to be put up and sold at public auction, and states to whom the several lots were sold by lot numbers. By deed dated February 18, 1852, he conveyed to Joseph Cudliff the four lots sold to him, and describes them by metes and bounds which exactly coincide

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with said survey and map, but without making mention of said lane. Said Cudliff was also the owner of premises lying north of the center line of said Perrit's or Lawrence's lane, and acquired the same by deed of David Codwise, Master in Chancery, etc., dated November 15, 1839, recorded November 30, 1839, the description whereof bounding the lots by said lane concededly conveyed title to the north half thereof. The said Cambrelling also, by deed dated February 16, 1852, recorded February 17, 1852, for a consideration of $1,590, conveyed to James Munson all those certain six lots sold to him, and the description in said deed likewise described the lots by metes and bounds as set forth in said map and survey, and likewise made no mention of said lane. The said Cudlipp subsequently acquired the interest of said Munson in the property last above described so far as it affects the premises sought to be conveyed by the defendant. Both of the above described referee's deeds were in the usual form, reciting all the proceedings, the judgment, sale, report of sales, etc. No separate sale of the land in the lane was made by the referee. Lawrence's lane was closed in the year 1868 by the several owners across whose land it ran, by the erection of fences, inclosing their lots. Almost the entire lane is now covered by expensive buildings, and its exit on the boulevard is covered by part of a five-story apartment house. No claim is known to have been made since 1851 by any of the Fisher heirs to any portion of said lane. It will appear from the above statement of facts that Cudlipp owned, by description in his deeds, the property on both sides of said lane and the north half thereof, but plaintiff claims the title offered is unmarketable because for the south half thereof, a strip ten feet wide and twenty-five feet long in this case, the conveyance was by metes and bounds, without reference to the lane, and, therefore, said strip did not pass by said referee's deed, and that is the sole question in this case.

It is well settled that a conveyance of land bounded on a highway carries with it the fee to the center of the road as part of the grant, and this is true of a lot bounded on a street and called a street, but which is not in fact a public street or highway. In the early case of Bissell v. N. Y. Central R. R. Co., 23 N. Y. 61, the Court of Appeals went farther and held that conveyances carried the fee to the middle of the street, although there was no express

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mention of any street in any of the deeds, the grantor describing the lots by their numbers, and in some cases giving size of lots, reference being had to an allotment and survey on which the street appeared. In the Bissell case, as here, the depth of the lot was stated in figures, which would not include any part of the street. Referring to the Bissell case, the Court of Appeals has recently said: "This construction has so long prevailed that it has become a rule of property, and it is founded upon the presumed intent of the parties to the conveyance. It is not reasonable to infer that the grantor intended to reserve the title to the fee of the narrow strip lying between the physical boundaries of the lot conveyed and the centre of the street or that the grantee understood that any such reservation had been made." Hennessy v. Murdock, 137 N. Y. 317. In a case like this, if necessary, to learn the intention of the parties, we may refer to the description in the complaint, the judgment, the notice of sale and to the map in the partition suit, which are public records. "The question now arises, what is the extent of such a grant? Does it go to the margin or to the center of the road as laid down on the map? This depends upon the intention of the parties as gathered from the terms of the deed, the situation of the land and, where there is doubt as to the intent, from the practical construction of the grantor and grantee and their successors in title (citing cases). The construction, in case of ambiguity, should be most favorable to the grantee." Matter of Ladue, 118 N. Y. 213. In the case at bar the judgment in the partition suit directed the referee to sell all the property described, which description covered the land in question. He reported he had so sold all the property. Both of the referee's deeds were in the usual form, reciting all the proceedings, the judgment, sale, report of sale, etc. The deeds described the property sold as certain lots with dimensions corresponding to the numbered lots on the map and to those reported sold. Taking into consideration the proceedings in the partition suit, which are public records and not parol evidence, it appears that the lots conveyed were the lots bounded on the lane, and so the fee went to the middle of the lane. Upon the facts before the court there is no material defect in the title to the premises in question. The title is marketable under the rules laid down in Heller v. Cohen, 154 N. Y. 306.

Judgment for defendant, with costs.

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THE CITY OF NEW YORK, Plaintiff, *v.* THE UNITED STATES TRUST COMPANY OF NEW YORK, Individually and as Trustee; ESTELLA J. JORDAN JOHNSTONE, Individually and as Executrix, Etc., of LOUIS J. JORDAN, Deceased; HENRY J. JORDAN, MARIA JORDAN and ANNIE REUFF (*née* ANNIE JORDAN), Defendants.

(Supreme Court, New York Special Term, August, 1901.)

Trust — Assailable when created by a life tenant and remaindermen to avoid a judgment debt of their testator.

Where a city has recovered a judgment against a debtor, whose will provided for the payment of his just debts and thereafter for a life estate in all his remaining property to his widow and executrix, she, where she has never accounted, cannot, by a trust created after his death by her and by his children, the lawful reversioners, for their benefit and covering his whole property, defeat the city from reaching the trust property and obtaining payment of its judgment.

ACTION by the plaintiff, as a judgment creditor of Louis J. Jordan, deceased, against the United States Trust Company and the beneficiaries under a certain trust agreement, for a judgment declaring the plaintiff a judgment creditor of the decedent Jordan to the extent of the judgment; that as such creditor the plaintiff has a lien upon the trust fund in the hands of the said trust company prior to the creation of said trust, and that the said trust company pay the plaintiff the amount of said judgment remaining unsatisfied, with costs.

John Whalen, Corporation Counsel, and Charles Blandy, for plaintiff.

Edward W. Sheldon (George L. Shearer and W. A. W. Stewart, of counsel), for defendant United States Trust Co.

Jurden E. Seeley, for defendant Johnstone, individually and as executrix.

CLARKE, J. On the 20th day of June, 1882, the mayor, aldermen and commonalty of the city of New York, plaintiff's predeces-

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sor, obtained a judgment against Louis J. Jordan in the sum of $3,371.92. Execution was thereafter duly issued and returned wholly unsatisfied. On the 15th of November, 1884, there was paid on account of said judgment by Mrs. Estella J. Jordan, his wife, the sum of $250. Otherwise said judgment remains unsatisfied. On or before the 26th of February, 1889, Louis J. Jordan, the judgment debtor, died, leaving a last will and testament, wherein after providing for the payment of his just debts and funeral expenses, and for the maintenance, support and education of his children, he gave, devised and bequeathed all the rest, residue and remainder of his estate to his said wife, to be used and enjoyed by her during her natural life, and appointed her sole executrix. The will was duly probated and letters testamentary issued to Mrs. Jordan. She duly advertised for claims against the estate and none were proved. The estate consisted of $16,954.90 collected on a policy of insurance which was made payable to the insured's executors, administrators and assigns. The executrix never filed any account with the surrogate and was never discharged as executrix. But on or about the 13th of March, 1889, she delivered to the United States Trust Company, the said sum of $16,954.90, the entire property of the estate of Jordan, under an agreement in which it was provided that the said trust company should receive and hold said moneys as trustee, to apply the income thereof to the use of two daughters of said Louis J. Jordan, in equal shares during their lives, and on their death to transfer the entire estate to his son, Henry J. Jordan, etc.

This trust agreement was executed by Mrs. Jordan and the son, Henry J., and subsequently a confirmatory agreement was executed and delivered by the daughters and releases were executed by all the children — who were the reversioners under the will — to Mrs. Jordan, the executrix, wherein and whereby they waived any judicial accounting by her, and provided that said releases should be regarded as constituting in all respects a full and complete ratification and discharge from her executorship. Outside of this trust fund there is no property of Jordan's estate. The city now brings suit against the trust company, the widow and executrix, and the three children, beneficiaries under the trust agreement, asking judgment decreeing that it is a creditor of the decedent to the extent of the judgment; that as such it has a lien upon said trust fund prior to the creation of said trust, and that the

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trust company pay to it the unsatisfied amount of said judgment, with interest. Upon the death of Louis J. Jordan his estate became liable for the payment of his just debts. Upon his executrix, vested with the legal title to the personal estate, devolved the duty of paying those debts not only by operation of law but by the express terms of the will. After the payment of the debts, she was given a life estate in decedent's property, and by operation of law, with reversion over to his next of kin — his children. Instead of paying this judgment debt, of which she was cognizant, and instead of retaining possession of the estate and enjoying it during her life, she elected to pay the entire amount coming into her hands over to the trust company under a trust agreement which disposes of the property in a different way than that contemplated in the will, and there it stands to this day. While no case, exactly on all fours with the case at bar has been cited to the court it would seem that, with all the parties and all the facts before the court in an equity suit, it ought not to be difficult or impossible for the court to find and apply a remedy. The fund which Mrs. Jordan disposed of by the trust agreement was received by her in her representative capacity, impressed with the duty of paying plaintiff's judgment debt. She has treated it as her own and disposed of it in toto, and it still exists intact. The legal title to it is in the trust company, but the beneficial use is in certain of the next of kin of decedent. It was only after the payment of just debts that it was applicable to any purpose. If it still remained in the hands of the executrix, or if it had been distributed to legatees, it might be reached by appropriate proceedings; can it be that by putting it in trust, in violation of her own duty first to pay debts, plaintiff must be defeated? To be sure, this is not an action under section 1837 of the Code. Such an action cannot be brought, as there has been no payment of legacies to legatees. The legal title is not under the will, but the trust deed. No precise code provision can, perhaps, be pointed out under which an action could be maintained. But there is the fund out of which this creditor should have been satisfied. All parties are before the court, the defenses interposed are solely technical objections to the form of the action, and hence I find myself constrained to direct judgment for the plaintiff.

Judgment for plaintiff.

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HENRY C. HOLT, Plaintiff, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Trial Term, August, 1901.)

New York city — Status of bath attendant — Compensation.

A bath attendant of the city of New York receiving three dollars a day is to be classed in schedule F of the classified civil service; he cannot be removed peremptorily, and where his place has not been filled he can recover his wages where he, although ready to serve, was prevented from so doing by his superior officer. It was held, however, that, as the season for bathing closed with September and as his appointment was in its nature temporary, he could not recover wages after October first.

ACTION to recover salary as a bath attendant of the defendant.

Mayer & Gilbert (Julius M. Mayer, of counsel), for plaintiff.

John Whalen, Corporation Counsel, and Charles W. Ridgway, for defendant.

CLARKE, J. In June, 1895, plaintiff was employed by the mayor, aldermen and commonalty of the city of New York as a bath attendant at a per diem compensation of three dollars, and was continued in such employment by the city of New York until the 11th day of June, 1898, when he was summarily dismissed by the commissioner of public buildings, lighting and supplies. He instituted proceedings for reinstatement upon the ground that his removal was in violation of section 3 of chapter 186 of the Laws of 1898, which provides: "and if a person holding a position subject to competitive examination in the civil service of the state or of a city shall be removed * * * the reasons therefor shall be stated in writing and filed with the head of the department or other appointing officer, and the person so removed * * * shall have an opportunity to make an explanation." Upon that proceeding he was successful, and was reinstated on the 22d day of July, 1899.

He now brings this action to recover $1,218, his compensation at the rate of three dollars per day from June 11, 1898, to July 22,

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1899, and claims interest from June 11, 1898, the date of his removal. The city interposed three defenses, the second of which was that during the period in question, another person had been employed by the defendant in his place, had discharged the duties appertaining to the place, and in good faith had been paid therefor. By stipulation this question was submitted to the jury for a special verdict, and they returned answer for the plaintiff, that no one had been appointed in his place. The first defense was that during the period involved, plaintiff performed no work or services for defendant, and, hence, being a mere per diem employee was entitled to no pay. It also interposed the partial defense that, the bathing season closing on the first of October, that plaintiff's employment was temporary in its nature, and that, if entitled at all to compensation, it was only for the period between June 11, 1898, and September 30, 1898. These two questions were reserved as questions of law. It has been decided by this court on the proceedings for reinstatement, that the position of bath attendant is in the classified civil service in schedule F, and, hence, that plaintiff's removal was wrongful. It has also been decided by Mr. Justice Bischoff, in People ex rel. Warschauer v. Dalton, N. Y. L. J., Dec. 15, 1899, construing the protective provisions of the Civil Service Law in reference to three dollars per diem employees unlawfully removed: "In effect there was a contract of employment terminable only for cause, and, *prima facie*, the refusal of the employer to assign the employee to work while the contract was in force and while the employee stood ready, operated as a breach for which the damages were to be measured by the agreed daily compensation." The Appellate Division, in O'Hara v. City of New York, 46 App. Div. 518; aff'd. 167 N. Y. 567, Mr. Justice Rumsey writing the opinion, said: "It must be regarded as finally settled in this State that one who is entitled to an office under a municipal corporation at a fixed or agreed upon salary, can recover the amount of that salary while he retains the title to that office although, in fact, he performed no services, if he was prevented from performing those duties by a superior officer who attempted to remove him in violation of the law, and no other person has filled the office and been paid for the performance of the duties thereof. * * * But it is claimed that the principle does not apply for the reason that the plaintiff does not hold any office, strictly speaking, but is a mere employee." In that case plaintiff was a veteran, and, after

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reviewing the veteran statutes, the opinion proceeds: "As a result of that statute the plaintiff was established in the position which he then occupied during his good behavior. That being the case, we are unable to see that his position differed in any degree from one who is a holder of an office created by law." So in the case at bar, as a result of the Civil Service Statute, the plaintiff was established in his position until the reasons for his removal should be stated in writing and filed with the head of the department, and the person so removed had an opportunity to make an explanation. It would seem that the reasoning applying to one statute should apply with equal force to the other. The statutes have given permanency to positions in the public service, whether they be called officers or employees, and if in violation of the statute the individual is removed and subsequently reinstated by the courts, he may recover his salary or compensation when no other person has filled the position and been paid for the performance of the duties.

But it has also been decided by Mr. Justice Leventritt in People ex rel. Gilfillan v. Kearny; People ex rel. Holt v. Same, N. Y. L. J. May 8, 1900, that the position of bath attendant is in the nature of a temporary employment, a number of them being taken on every summer and only a few being retained at the close of the bathing season to take care of the floating bathing-houses during the winter. "The contention of the relators that, because they have on occasions been among those selected to do winter work, they are permanently entitled to those places to the exclusion of all other summer attendants is unfounded. * * * Their services could be properly dispensed with at the close of the season." Therefore, plaintiff might properly have been discharged at the end of the bathing season in 1898. It seems to me that under the evidence I must find that he would have been so discharged, and construe the attempted removal on June eleventh as notice that he would be discharged on October first. People ex rel. White v. Coler, 56 App. Div. 171.

Upon these conclusions of law and upon the special verdict judgment may be entered for plaintiff for the amount of his compensation from June 11 to September 30, 1898, with interest thereon, costs and five per cent. allowance.

Judgment for plaintiff, with costs.

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JAMES FRANCIS MADDEN, Plaintiff, *v.* ROBERT A. VAN WYCK et al., Defendants.

(Supreme Court, New York Special Term for August, 1901.)

Taxpayer's action to restrain the letting of a garbage contract — Defective complaint — Municipal officers should be protected.

A complaint by a taxpayer which alleges that the city commissioner of street cleaning, by his advertisement for bids for removing garbage, required the successful contractor to build and operate a suitable plant within thirty days although the commissioner knew that only one company specified in the complaint then had such a plant, and that a new one could not be built in thirty days, that although there were two other lower bidders he and the city board of estimate awarded the contract to the company specified, and that said board knew when it made the award that the price accepted was "extravagant", when unaccompanied by any allegations of fraud, fails to state a cause of action, as fraud is not to be presumed against municipal officers, it was their duty to let the contract, the charge that they knew that only one suitable plant existed is not an allegation nor proof that only one such did exist, the charge that they knew the price to be "extravagant" is not an allegation that it was excessive, and the statement that there were other lower bidders is not an allegation that those bidders were able and willing to comply with the conditions of the contract.

MOTION for an injunction *pendente lite*.

John W. Brainsby, for motion.

John Whalen, Corporation Counsel; George L. Sterling, and De Lancey Nicoll, opposed.

GILDERSLEEVE, J. This is a suit in equity for an injunction restraining the board of estimate and apportionment and the commissioner of street cleaning of the city of New York from making or authorizing a contract with the New York Sanitary

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& Utilization Company for removing and disposing of garbage from the city. The questions presented arise on the plaintiff's motion to continue a preliminary injunction during the pendency of the suit. The substance of the plaintiff's complaint is that the commissioner's advertisement for bids for removing garbage required that the contractor for the work should build and put in operation a suitable plant and begin the work within thirty days after the contract should be executed, although the commissioner and the board of estimate then knew that the only party possessed of such a plant was the New York Sanitary & Utilization Company, and that it was impossible to erect such a plant within one month; that the commissioner also knew, when he called for bids, that the conditions prescribed for the contract were such as would prevent competitive bidding within reasonable limits, and that the Sanitary & Utilization Company only could comply with them; that the contractor was also required to deposit $40,000 as security for the performance of the contract; that, although two other parties bid for the work sums which were much less than the amount bid by the Sanitary & Utilization Company, the contract was awarded to that company; that the board also knew, when it awarded the contract, that the price allowed was "extravagant" and "calculated to injure the rights" of other bidders. The complaint is fatally defective. It states no ground for relief, either for the illegality of the contract or for fraud on the part of the board and commissioner in entering into it. There is not a word on the subject of fraud in the entire complaint, nor is there any proof of fraud by affidavit. The plaintiff can hardly expect the court to infer fraud from the allegation that the board and commissioner knew, in effect, that the conditions prescribed for the contract would throw it into the hands of the Sanitary & Utilization Company. There is no evidence available for the purpose of this motion before me that they knew anything of the sort. That they had formed any design to accomplish such a purpose is not charged, and cannot be inferred. There is no presumption of law nor any antecedent probability that municipal officers habitually proceed contrary to law or act from corrupt motives, which dispenses with the necessity of pleading facts appropriate to such a cause of action as the plaintiff here claims to have. If it be assumed, however, that the knowledge attributed to them existed in the minds of the

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commissioner and of the persons who compose the board of estimate and apportionment, and that it is evidence of fraudulent intent on their part, in connection with the letting of the contract, it would lead logically to the conclusion that, possessed of this knowledge, they should either not have advertised for bids at all, or should not have prescribed the conditions which they annexed to the contract. This would be a gross absurdity; for, whatever those officers may have known on the subjects in question, their duty was to have the work done, and the conditions which the plaintiff complains of were reasonable and just. The charge that the board knew that the price allowed for the work was "extravagant" is not supported by any proof, and on this motion can be allowed no weight whatever. Besides, the plaintiff does not charge that, in point of fact, the price was excessive; he contents himself with the mere averment that the board knew it to be "extravagant"; which is not equivalent to an allegation of the fact. And this criticism applies to the charges that the board and commissioner knew that the Sanitary & Utilization Company only had the requisite plant for the work; that it was impossible to erect such a plant in one month; and that the conditions of the contract were of such a character as to prevent competition in the bidding. The plaintiff has not averred these facts; he merely states that the board and commissioner knew them. Nor has he attempted to prove them by the parties who alone knew them if they really exist. The question here is not what the defendants knew or did not know, but what the plaintiff claims to be the facts on which he rests his case. In point of fact, the defendants show that, in respect to the charges, that no one but the Sanitary & Utilization Company had the necessary plant, and that such a plant could not be built in a month, those charges were not true. Again, the complaint avers, generally, that conditions were prescribed for the contract, but does not state specifically what they were, nor that the two other bidders, Messrs. McGill & Co. and James F. Barrett, were able and willing to comply with them. If they were not willing to accept and fulfill those conditions, they were not in a position to raise any question respecting the requirement concerning the plant, and were, therefore, not competent bidders. If so, their bids were not entitled to be considered by the board or commissioner, nor can they be now regarded by the court in determining, by comparison, whether the price allowed

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to the Sanitary & Utilization Company was excessive or not. But, aside from these defects in the complaint, and viewing the case on the merits, I think that the board and the commissioner have conducted themselves in a strictly lawful and judicious manner. They have followed the provisions of the charter of Greater New York, and have wisely used the discretion which that charter intrusts to them, and which, from the necessity of the case, is essential to a responsible and effective discharge of their functions. The courts of this State have uniformly allowed municipal bodies the largest latitude of discretion where they could do so consistently with established principles of statutory construction. Charter Greater New York, L. 1897, ch. 378, § 544; Matter of Dugro, 50 N. Y. 513; Kingsley v. City of Brooklyn, 78 id. 200, 215; Baird v. Mayor, 96 id. 567, 593; Talcott v. City of Buffalo, 125 id. 280, 288. This case exemplifies the facility with which the leisured taxpayer in modern times lends himself to the designs of jealous and disappointed contractors who, for the sake of reprisal upon the municipality, bring desperate suits for injunctions with no expectation of success, thereby vexing the city officials and impeding the prosecution of public works, to the detriment of the health, comfort and convenience of the community. This is a practice which cannot be too severely reprehended. Motion denied, with ten dollars costs.

Motion denied, with ten dollars costs.

JULIA COLLINS, Plaintiff, *v.* JAMES McWALTERS et al., Defendants.

(Supreme Court, New York Special Term, August, 1901.)

Bankruptcy — Effect of discharge, in State court — "Judgments in actions for fraud" construed — Debt, not scheduled, when not discharged.

A discharge in bankruptcy is not *per se* an extinguishment of the debt and no court, other than that in bankruptcy, is bound to take notice of it unless it is pleaded as a release.

A judgment for money had and received arising out of a transaction by which the judgment creditor, a grantee, lost real estate pur-

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chased by her because her grantor, the judgment debtor and voluntary bankrupt, after inducing her to withhold her deed from record, sold the same premises to a third person, is, where her complaint contained no allegations of fraud and fraud was not the gravamen of her action, not within the "judgments in actions for fraud" which the Bankruptcy Act of 1898 (§ 17, subd. 2) declares shall not be released by the discharge.

A debt is however not discharged where it has not been scheduled at all and the creditor has had neither notice nor actual knowledge of the bankruptcy proceedings. (§ 17, subd. 3).

MOTION to set aside an order in supplementary proceedings, on the ground of a discharge in bankruptcy.

Herman N. Hansen, for motion.

James E. Smith, opposed.

GILDERSLEEVE, J. In December, 1893, the defendants, James McWalters and Mary McWalters, his wife, sold two lots of land in the city of New York to the plaintiff, Julia Collins, and received therefor the sum of $900. At the time, as alleged in the moving papers, said James McWalters assured plaintiff that it was not necessary to record the deed. Subsequently, but at what exact date the papers before me fail to show, the defendants again sold those lots to one Hamilton, notwithstanding the previous sale to plaintiff. Thereafter, and previous to November, 1899, but at what precise time it does not appear, the plaintiff demanded the return to her of the $900, so paid by her to defendants for the said lots. On December 30, 1898, the defendant James McWalters filed a petition in bankruptcy, and on July 25, 1901, obtained his discharge in bankruptcy from all debts which existed on December 30, 1898, the date of the filing of the petition in bankruptcy, provable against his estate, except such debts as are by law exempt from the operation of a discharge in bankruptcy. The debt owing to plaintiff was not mentioned in the schedules in such bankruptcy proceedings, and said defendant did not include the plaintiff in his list of creditors. Meanwhile, and in November, 1899, plaintiff commenced this action against defendants to re-

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cover the $900, aforesaid, and on May 18, 1900, the plaintiff recovered a judgment for $1,089.20 damages, interest and costs, which was duly entered on May 21, 1900, and is still unsatisfied of record and unpaid. Several motions have, apparently, been made for the examination in supplementary proceedings of the defendants, and the defendant Mary McWalters has been examined, but the other defendant, although ordered to attend for examination, has thus far contrived to elude such examination. He now makes a motion to vacate an order made on July 26, 1901, requiring him to appear for examination in supplementary proceedings, on the ground that the judgment was discharged by the bankruptcy proceedings. No motion is made, under section 1268 of the Code, for an order directing the judgment to be cancelled and discharged of record, for the reason that a year has not elapsed since defendant's discharge in bankruptcy, as required by the section in question, which reads as follows, viz.: "At any time, after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court * * * for an order, directing the judgment to be cancelled and discharged of record. If it appears, upon the hearing that he has been discharged from the payment of that judgment, or the debt upon which such judgment was recovered, an order must be made," etc. A discharge in bankruptcy is not *per se* an extinguishment of the debt, and no court, other than the court of bankruptcy, is bound to take judicial notice of the discharge. It is, however, a release which may be pleaded. See Collier on Bankruptcy (3d ed.), 198. The defendants here set it up, as we have seen, as a defense to the said order of July 26, 1901, and as a reason for setting the same aside. Plaintiff claims that this judgment is not covered by the discharge. The Bankruptcy Law of 1898 exempts from discharge "judgments in actions for fraud." § 17, subd. 2. But this provision appears to apply only to cases where fraud is the gravamen of the action, and in which proof of fraud is essential to the recovery, and does not include a judgment rendered in an action in which the right of recovery is based upon an act not essentially fraudulent although fraud may be incidentally shown. Burnham v. Pidcock, 58 App. Div. 273. A copy of the complaint in this action is annexed to the moving papers, and on its face does not

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appear to raise any question of fraud. It simply alleges the receipt by defendants of the $900, the demand for its return and refusal of defendants, and that it is owing to the plaintiff from the defendants. Fraud is charged in the opposing affidavits on this motion, but defendants deny the charge of fraud. From the complaint, as I have said, there is nothing to indicate "that fraud was the gravamen of the action" or that "proof of fraud was essential to the recovery." The objection to the motion, based on the ground that the judgment was recovered in an action for fraud and is therefore not affected by the discharge in bankruptcy, is not sustained. There is a preponderance of proof before me that the action was not for fraud. There is another point, however, which seems of more weight in the opposition to this motion. Section 17 of the Bankruptcy Law exempts from release under a discharge in bankruptcy, among other things, such debts "as have not been scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless the creditor had notice or actual knowledge of the proceedings in bankruptcy." It is admitted that the debt to plaintiff was not scheduled at all, but defendants claim that plaintiff had actual knowledge of the proceedings in bankruptcy, although it is conceded that no notice was given to the plaintiff. Both plaintiff and her attorney emphatically deny, on oath, that they, or either of them, had "any actual knowledge of the proceedings in bankruptcy until long after the expiration of the time for proof and allowance of the debt in the bankruptcy proceedings." I am inclined to hold that the defendants have not substantiated their claim in this respect by a fair preponderance of evidence. The judgment, as we have seen, remains unpaid and unsatisfied of record, and the order for the examination of defendant is conceded to be regular in form, and I do not think, under the proof here presented, that this defense of a discharge in bankruptcy is available. The motion to set aside the order of July 26, 1901, referred to in the moving papers, is denied, with $10 costs.

Motion denied, with $10 costs.

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JULIUS LESZYNSKY, Plaintiff, *v.* CHARLES A. ROSS, Defendant.

(Supreme Court, New York Special Term, August, 1901.)

Fraud — Rescission — Presumption of knowledge of contents of instrument signed — Opinion as to legal effect — Expression of judgment as to the situation.

Where an agreement between the owner of certain stock and a promoter of its sale in a foreign market provides that the owner shall ultimately receive thereunder both stock and cash, the owner cannot rescind a second agreement, by which he for value surrendered to the promoter his rights under the first, upon allegations that the promoter falsely represented to him that under the first the owner was only to receive either stock or cash — where the owner also alleges that he never saw the first agreement, that it was executed by his attorney in fact, that he had no knowledge of its contents except as it had been communicated to him, and that he believed the agreement to be as written and as it appeared on its face.

Parties are presumed to know the contents of an agreement they sign; and if either mistakes its legal effect it is not actionable fraud available to the other.

In such a situation as that above stated a party has no right to rely upon the statements of his adversary.

It is to be presumed that the attorney of the owner correctly stated to him the contents of the agreement.

An alleged statement of the promoter, that it would be impossible for him to advance the sale of the stock unless the owner took it out of a pool into which it had been put and assigned it to him, is only the promoter's statement of his judgment as to the situation and cannot constitute actionable fraud where he did not suppress any material conditions which the owner had a right to know.

DEMURRER to complaint.

McCarthy & McMahon (Felix H. Levy, of counsel), for plaintiff.

Evarts, Van Cott & Erskine (Sherman Evarts, of counsel), for defendant.

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RUSSELL, J. The demurrer to the complaint, if well founded, may save the need of a trial upon the facts as the strength of the plaintiff's case is carefully stated, and the pleadings free from criticism save as the facts stated may fall short of affording relief.

The controversy is between two persons engaged in the floating of mining properties. They made two agreements, somewhat involved in their character, the one dated May 15, 1899, and the other September 13, 1899. The plaintiff seeks to rescind the latter agreement, on the ground of fraud of the defendant by which plaintiff was induced to assign his interest in the first agreement.

The plaintiff appears to have been the owner of mining properties in Arizona which were transferred to a corporation with 100,000 shares of stock of £1 par value each, he receiving 75,000 shares for his properties, leaving 25,000 as treasury stock. By the first agreement with the defendant, made in London, the plaintiff requested defendant to market his shares of the stock and agreed to give him 50,000 shares thereof. It was thereafter provided that the whole 75,000 shares should be placed in a trustee pool, and, out of the sales up to £14,000, £10,000 thereof should be used to purchase working capital shares of the company at par, and £3,000 should be paid to plaintiff and £1,000 to the defendant. The plaintiff's shares in the proportion stated should not be sold for less than fifteen shillings each, and if they would not bring that sum the defendant should contribute enough shares to make up such deficiency. One-fourth of all further shares sold were to be applied to buy the remaining working capital shares at par, and thereafter the plaintiff should be paid one-third of the proceeds of sales, and the working capital shares so purchased were to belong to the parties in proportion of one-third to the plaintiff and two-thirds to the defendant.

By the second agreement also made in London, the plaintiff, in consideration of £3,500, £650 of which was paid down, assigned to the defendant all the benefit, estate and interest he had under the former agreement. The vendor's shares were to be deposited with Seligman Brothers in London until full payment of the purchase price, and, if not paid by the 1st day of July, 1900, they were to be handed back to the vendor.

The last clause in this agreement reads as follows: "In the event of a part only of the said sums being paid to the Vendor

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on or before the first day of July, one thousand nine hundred, then the obligation of the Vendor to assign his interest under the agreement hereinbefore contained shall wholly cease and determine, and all shares deposited in escrow shall be returned to the Vendor. And the Purchaser will do all such acts and things and sign such documents as may be necessary to revest all interest under the said agreement in the Vendor; but all the sums of money paid or to be paid to the Vendor under this Agreement shall be deemed to be payments to him *pro tanto* on account of the sums of money payable to him under the said Agreement of the fifteenth one thousand eight hundred and ninety-nine."

The allegations of fraud by which the second agreement was obtained are mainly as to the terms or construction of the first agreement. It is asserted that the defendant falsely represented that by such agreement the plaintiff was entitled only to receive £3,000 in cash, or 25,000 shares in stock, and not both as was provided for. Presumptively this would be a statement simply of the legal construction of an agreement of some intricacy, for both parties are supposed to know the conditions of an agreement which they mutually sign and, if either errs as to the legal effect, such error cannot be made the basis of an action for fraud because of a misstatement of the legal construction. Booth v. Dodge, 60 App. Div. 23.

The plaintiff seeks to avoid responsibility for such a presumption by the averment that the first agreement was executed on his behalf in London by an attorney in fact; that he "had never seen said agreement and had no knowledge of its contents and provisions except as the same had been communicated to him, but did believe that said contract was in terms as the same is written and appears upon the face of said contract."

Without any farther averments of facts showing a contrary inference, the silent presumption from this language would be that the contents and provisions of the instrument had been communicated to the plaintiff by his own attorney pursuant to a presumed duty, and that the belief, that the terms of the contract were as they now appear upon its face, came to the plaintiff from such information communicated to him by his attorney. Therefore, from such averment and inference, the conclusion follows that he did know the actual terms of the contract, and, in the absence of excusing statements of fact, had no right whatever to

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rely upon the assertions of the party seeking to obtain his interest and who was then at least dealing with him at arm's length.

But the very contract which he did sign in September, assigning his interest to defendant, negatives his own assertion that he was misled. It shows that his right in the original contract was not an alternative one of stock or cash, but an unquestioned right to both. The section of the second contract which has been quoted provides for the reversion to the plaintiff, in case the purchase price of the second contract was not fully paid by the defendant of plaintiff's shares of stock secured by the original agreement, and also an application of the sums paid towards the purchase to the liquidation of the cash the plaintiff was to receive under such original contract. It is, therefore, plain that an agreement, providing for a return of stock and cash under the rights secured by the first agreement, could not have been obtained by any fraudulent statement that such first agreement only gave the alternative of stock or cash.

The further allegation in the complaint of the statement, that it would be impossible for defendant to accomplish anything unless plaintiff would take the stock out of the pool and assign the same to the defendant, is not a misrepresentation of fact when unaccompanied by any averments showing a suppression of material conditions which the plaintiff had a right to know. It is a mere statement of the judgment of the defendant as to the situation, and such an opinion could not be made the basis of fraud. Gordon v. Butler, 105 U. S. Sup. Ct. 553; Holbrook v. Connor, 60 Maine, 578.

Judgment is directed for the defendant sustaining the demurrer, with costs, with leave to amend within twenty days on payment of costs

Demurrer sustained, with costs, with leave to amend within twenty days on payment of costs.

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JOHN V. SIGNELL, Plaintiff, *v.* JAMES G. WALLACE, as Commissioner of Buildings, Defendant.
(Five cases.)

(Supreme Court, New York Special Term, August, 1901.)

Tenement House Act for cities of the first class — Police power — Unreasonable requirement as to houses for which plans had been filed when the unamended act took effect — L. 1901, ch. 334, § 4, amd. ch. 555.

Section 4 of the new Tenement House Act (L. 1901, ch. 334, in effect April 12, amd. ch. 555, in effect April 25) providing in substance that in cities of the first class an incomplete tenement-house, for which plans complying with the law existing at the time of filing had been filed with the city department of buildings on or before April 10, 1901, for which excavation had been commenced on or before June 1, 1901, after official approval of the plans, and which was built in accordance with the law existing at the time of such filing, should be subject to such provisions only of the new statute as affected tenement-houses existing at the time of its passage, is a valid exercise of the police power, but the further requirement, that the first tier of beams of such a tenement-house must have been set on or before Aug. 1, 1901, is an unreasonable and oppressive exercise of that power and is therefore invalid.

MOTIONS to continue temporary injunctions restraining the defendant from interfering with the plaintiffs in the construction of certain buildings provided that said buildings are built in accordance with the laws in force prior to the 10th day of April, 1901, and in accordance with the plans and specifications as filed and approved by the Commissioner of Buildings for the Boroughs of Manhattan and The Bronx and restraining him from enforcing any of the provisions of chapter 334 of the Laws of 1901 known as the "Tenement House Act" as against the plaintiffs.

Wechsler & Burstein, for plaintiffs.

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John Whalen, Corporation Counsel (Samuel J. Parmenter and Charles J. McCafferty, of counsel), for defendant.

O'GORMAN, J. Section 4 of the new Tenement-House Act, which became a law on April 12, 1901, declared that tenement houses upon which work had been actually commenced after approval of the plans by the department of buildings should be subject only to the provisions affecting existing tenement houses. It will be noticed that this section offered no protection to persons who had already filed plans which were awaiting examination and approval on the day the new law went into effect. In an attempt to remedy this omission it is claimed the Legislature exceeded its powers in passing on April 25, 1901, an amendment (ch. 555) to section 4 so that the same reads as follows: "Buildings in process of erection.—Section 4.—A tenement house not now completed, but the excavation for which shall have been commenced in good faith on or before the 1st day of June, 1901, after approval of the plans therefor by the department of buildings, and the first tier of beams of which shall have been set on or before the 1st day of August, 1901, shall be subject only to the provisions of this act affecting now existing tenement houses; provided that the plans for the said house were filed in said department on or before the 10th day of April, 1901, and were in accordance with the laws in force at the time of filing, and that the building is built in accordance with such laws." In the five cases before the court it is conceded that the work was commenced in good faith before June 1, 1901. In none of the cases, however, was the first tier of beams completely set by August 1, 1901, and this situation was due to strikes and other causes beyond the control of the builders. The plaintiffs insist that this requirement touching the setting of the first tier of beams before August 1, 1901, was an oppressive and unreasonable enactment, and, therefore, invalid. This provision must be upheld, if at all, as an exercise of the police powers of the State, but these powers have certain limitations, and cannot be used arbitrarily without regard to private rights. Enactments made in the exercise of this power must be reasonable, and tend in some plain and appreciable manner towards the accomplishment of the objects which the Legislature has the right to protect under the exercise of this power. Where the exaction is excessive, unfair,

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oppressive and unreasonable, and under the forms of law confiscates private property, the constitutional rights of the citizen are invaded, and the act will be condemned by the courts. The requirement in the amended act that work be commenced in good faith before June 1, 1901, in order to secure for the builders the benefits of the act relating to existing tenements is a valid exercise of the police power, but the provision arbitrarily requiring that the first tier of beams be set by August 1, 1901, must be pronounced invalid. It was certainly as unreasonable as it was an unnecessary means of attaining the main object of the act. It had no direct tendency towards the accomplishment of the main purpose of the legislation. If the work was begun in good faith by June 1, 1901, and that it was is conceded, the public welfare was sufficiently safeguarded and there is no reason for the imposition of penalties for not progressing with the work by arbitrary stages. It is claimed and, not disputed, that these plaintiffs will lose large sums of money if they should now be required to make the changes necessary to conform to the laws now in force. The new Tenement House Act makes radical changes in the nature, method, style and class of materials, and in the Signell building it is averred, and not denied, that if compelled to change the building to conform to the laws now in force upwards of $70,000 worth of work actually done and materials furnished will be rendered absolutely useless, to say nothing of the liability incurred by the owner in other contracts. The same is substantially true of all the plaintiffs. If the Legislature had the right to impose such a restriction upon the builders it might, with equal propriety, declare that the second or third tier should be completed by a specified date. The Signell case offers a good illustration of the unreasonable features of this provision. Signell's plans were actually approved and permit granted under the old law on April 8, 1901, four days before the new act became a law. He is building a row of houses on Central Park West, from Ninetieth to Ninety-first street. The first tier of beams has been laid to the extent of about one-half of the block, but owing to the non-delivery of iron material the setting of the other half of the first tier was not completed by August 1, 1901. Although delayed in this respect, he has made other progress in the work so that the walls were up to almost the second tier, and the entire job much further advanced than if the first tier had been completely set. To enforce such a

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law, under such circumstances, with such disastrous consequences to the citizen, would be an act of spoliation under judicial sanction. Motions to continue the temporary injunctions *pendente lite* are granted.

Motions granted.

FREDERICK T. HALLETT, Suing for Himself and Other Creditors Similarly Situated, Plaintiff, *v.* THE METROPOLITAN MESSENGER Co. et al., Defendants.

(Supreme Court, New York Special Term, August, 1901.)

Stock corporation — Stockholder's liability to its attorney — Their statutory liability to creditors — Amounts unpaid on stock cannot be reached by creditors — Rights of creditor suing for all others — L. 1892, ch. 688, § 54; Code C. P., §§ 1790, 1792.

Section 54 of the Stock Corporation Law does not make the stockholders of an insolvent stock corporation personally liable to its unpaid attorney, upon the ground that he is one of the "laborers, servants or employees other than contractors" of the corporation; as the attorney is not within these classes and is merely an ordinary creditor.

The statutory liability to creditors thereby imposed upon stockholders to the amount of their stock, in a case where the capital stock outstanding at the time the debt was contracted has not been fully paid, is not avoidable by a stockholder although he did not actually subscribe for the stock and it was issued to him without full payment.

The right of the creditor to recover his debt of the stockholder differs from the right of the corporation to recover of him the amount unpaid upon his stock in that the latter right remains in the corporation, its receiver or general assignee; therefore a creditor cannot reach amounts unpaid upon the stock.

Where the capital stock of an insolvent corporation has not been fully paid and it has sufficient solvent defendant stockholders to pay the debt of a plaintiff creditor, who by his assignee sues as well for all others similarly situated, and no other creditors are or have made

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themselves parties to the action, the court will not attempt to reach and impound therein all possible assets of the corporation nor will it make its general assignee, theretofore created, account, but will impose the creditor's debt on the solvent defendant stockholders in proportion to the amounts of their stock.

ACTION by the plaintiff, suing for himself and all other creditors of the principal defendant, an insolvent corporation, to enforce against it, and certain defendant stockholders of it, a liability for a balance of unpaid subscriptions to the stock, their statutory liability where the capital stock has not been fully paid, and to compel the general assignee of the corporation to account for an alleged balance in his hands.

Ira G. Darrin, for plaintiff.

David Thornton, for defendants Knight & Barnes.

Cameron & Hill, for defendants Blackburne and Bidstrup.

Howard A. Sperry, for defendants Lancaster and Hunter.

Percy L. Klock, for defendants Klock and Thompson.

Walter L. Bunnell, for defendant Schuhman.

RUSSELL, J. The Metropolitan Messenger Company is an insolvent corporation which made a general assignment for the benefit of creditors, the assignee being a party to this action. The plaintiff is a judgment creditor, with execution returned unsatisfied, his original claim being assigned to him by Ira G. Darrin, who performed services as counsel for the insolvent company. This action seeks to group together the liability, claimed against various defendants for the balance of unpaid stock subscriptions, and for the statutory liability attaching against stockholders where the capital stock is not fully paid, and also an accounting against the assignee for the balance which should be in his hands. It would seem that the original claim of the as-

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signor against the company was *prima facie* proven by the judgment, and is higher evidence of indebtedness than a promissory note issued by the company. But this holding is unnecessary for the proof shows the original demand to be a just claim now merged in judgment.

Plaintiff cannot recover against the stockholders for their personal liability to laborers, servants or employees other than contractors. Bristor v. Smith, 158 N. Y. 157. He stands as an ordinary creditor and his recourse against the stockholders, so far as the same is of a statutory character, must be under that part of section 54 of the Stock Corporation Law (L. 1892, ch. 688) which provides for their liability to an amount equal to their stock respectively, "For every debt of the corporation, until the whole amount of its capital stock issued and outstanding at the time such debt was incurred shall have been fully paid." R. S. (Banks' 9th ed.) 1025.

The evidence shows that, on or about the 2d day of April, 1898, there was issued to the defendant Knight thirty shares of the stock at the par value of $3,000, for which only $1,500 was paid. I cannot assent to the reasoning of the counsel for defendants that a corporation has the right to issue its stock for less than its face, or as a pure gift, at its pleasure, or that a person has a right to become a shareholder under such a transaction with the purpose or effect of avoiding the liability which the law imposes for the protection of creditors, dealing with the corporation on the assumption that its advertised capital is fully paid. Nor can I hold that the mere form of signing a subscription to the capital stock so changes the affair that a recognized obligation to the corporation for a percentage of the unpaid subscription determines the statutory liability of the stockholder, while by going through the other form of issuing the stock to him for nothing without a subscription the object of the statute would be defeated, and the stockholder exempt. It would be easy to avoid the beneficent purpose, for which the liability of stockholders is created by law, if such a mode as the latter could be used to evade liability. I, therefore, hold that, as to two of the certificates at least issued to Knight, his stock was not fully paid.

Thirty of the shares issued to E. S. Barnes were only half paid for. Five shares were issued to T. C. Renwick, for which

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nothing was paid. The claim is made in reference to this Renwick stock that the corporation could not have recovered the amount thereof because, although he became a shareholder willingly, he never agreed to pay for the stock issued to him. It is gravely urged that, unless a debt to the corporation itself is created, there is no foundation for the statutory liability, no matter how much the certified paid-up capital of the corporation may be. This argument fails to recognize the very purpose for which that liability was created, and the wide distinction between its origin and design and that of the obligation arising by contract upon a promise to pay for stock issued. The latter is a right vested in the corporation itself and passes to its receiver, while the other never goes to the corporation but springs up in its very inception to creditors of the corporation who have, otherwise than as creditors, no interest in its receipts. Farnsworth v. Wood, 91 N. Y. 308.

Creditors may not recover the amount unpaid upon stock transferred gratuitously. Christensen v. Eno, 106 N. Y. 97.

The term "creditors" does not even include the directors of the corporation. McDowall v. Sheehan, 129 N. Y. 200.

Thus, while it is now in this case held that the plaintiff has complied with the requirements of law to give him the statutory remedy against the stockholders, yet it is also decided that he cannot recover for any amount that may be due upon unpaid stock issued, which claim belongs to the corporation or its assignee. Glenn v. Garth, 133 N. Y. 18.

This ruling is, of course, subject to the equitable power in necessary cases to reach all of the property of the corporation, and which might be applied in this action if essential to full relief.

There is no such necessity arising here. The amount of stock held by solvent stockholders greatly exceeds the claim of the plaintiff, which amounts only to the sum of $1,019.53, with interest from September 12, 1899. What occasion is there, therefore, for farther relief to him? Presumably a litigation farther extended into the affairs of the corporation would be detrimental to his interest. The defendants are far more likely to pay his comparatively small judgment than the united claims of all the creditors, and the interdefense litigation would greatly embarrass the smooth conduct of his own controversy. Nor, were he will-

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ing to assent to judicial adjustment of the claims of all brought personally within the jurisdiction of this action, could the court assent to such a widening of its character. There being no necessity for the same, the right to reach the controverted equities of the defendants as between themselves may not depend upon the volition of the plaintiff. Otherwise, a friendly creditor of a corporation who had perfected his legal remedy, might serve as a refuge to those who had been inert, or unable to place themselves in the state of legal requirement, so that they, under cover of his just claim, upon the plea that equitable jurisdiction is so broad that it may gather to itself all the remains of a decaying corporation, reach favorable results which they could not otherwise obtain. Although the court has called the attention of the parties to the omission, but a single other creditor, so far as appears by the pleadings, has obtained judgment and issued execution which is essential to recovery under the statutory liability clause. United Glass Co. v. Vary, 152 N. Y. 121; Hirshfeld v. Bopp, 145 id. 85.

No creditor has obtained an order to join himself as coplaintiff under a plea that he was similarly situated to the plaintiff. And, as has been before indicated, none of the creditors are entitled to the amount due for unpaid stock subscriptions, and, therefore, cannot court an investigation into that subject. Nor does the joinder of the assignee for the benefit of creditors, and the request to the relief of an accounting against him, extend the scope of this action beyond its necessity. The plaintiff himself urges that the assignment was honest and presents no reason why the assignee should not proceed with his trust duty, collect any unpaid subscriptions to stock due to him for the corporation, and account to the usual tribunal.

The provisions of the Code of Civil Procedure do not require any action beyond that essential to relieve the plaintiff. An action of this character may be brought by creditors, or a separate action against individual stockholders. Code Civ. Pro., §§ 1790, 1791. The court must, only when it is necessary, cause an account to be taken of the property and the debts, and apportion the defendants' liability, but, even then, when the corporation is insolvent, it may ascertain and determine the amount of each defendant's liability without an accounting. § 1792.

Judgment is, therefore, directed in favor of the plaintiff and

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against the defendants who are stockholders for the amount of the plaintiff's judgment and interest, with costs; but the judgment shall state the respective amounts of the liability of each such defendant, being the amount of stock held by him, with the costs against all, and execution shall provide for the cessation of its enforcement against each defendant on the payment by him of the amount of stock so held, or, in case his stock is greater in amount than the judgment and costs, upon the payment of such judgment and costs.

Judgment accordingly.

MAGGIE A. COLEMAN et al., Plaintiffs, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Special Term, August, 1901.)

New York city — Dumping board at foot of E. 80th street enjoined as a nuisance — L. 1887, ch. 697; 1888, ch. 272; 1889, ch. 257.

The statutes, under which the city of New York was empowered to condemn land between E. 64th and E. 86th streets on and along the East river and construct thereon an exterior street and wharf running to the bulkhead line, contemplated the construction and maintenance of these solely for street purposes and the public use.

The said statutes do not authorize the city to maintain, along the outer end of a wharf constructed by it at the foot of E. 80th street, a long dumping board for ashes, street sweepings and rubbish, and particularly where it projects far beyond the bulkhead line and has under it compartments to sort out articles of value found in the refuse; and therefore owners before condemnation, abutting on the exterior street at this point, prejudiced by floating ashes and offensive odors, and deprived of the use of the wharf, in case they require it, by the dumping board may restrain the maintenance of it as a nuisance, although the exterior street improvement remains unfinished — it appearing that the city has had four years' time in which it might lawfully have completed it.

ACTION for an injunction.

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Louis O. Van Doren, for plaintiffs.

John Whalen, Corporation Counsel (Charles Blandy and E. J. Freedman, of counsel), for defendant.

RUSSELL, J. The plaintiffs are three separate property owners of lots lying between Avenue B and Exterior street on East river in the city of New York. One of the lots is bounded easterly by Exterior street, northerly by Eightieth street, and westerly by Avenue B. Another is on the north line of Eightieth street and the remaining lot adjoins the last-mentioned one. Exterior street is not graded or paved as yet, but has been partially occupaid by a city dock extending westerly from the bulkhead line. In recent years the street cleaning department, acting in unison with the dock department, has maintained from the bulkhead line easterly a dump board carried out twenty feet beyond the bulkhead line, and covering about 168 feet of the dock front. Underneath the dumping board are compartments for the sorting of rubbish, which is available to the city for sale. The dump board is reached by the city carts through Eightieth street, and is used for the occupation of the carts so that by tilting them ashes, street sweepings and rubbish, including cans, boxes and similar things, may be deposited in the city scows. Laborers pick over the deposits in the scows, and place those materials deemed of value in the compartments underneath the dump board, from whence they are carried away by the contractors of the refuse.

Such an occupation of the river front is a serious disturbance to the valuable use of the plaintiffs' premises for any present or future purpose. The ashes and cinders sometimes float in the air with the prevalence of wind, and the refuse emits at times odors which are offensive. The river front cannot be utilized by the plaintiffs, and its practical value to them for commercial purposes is substantially destroyed. Their lots face the westerly side of Exterior street, but the public waterway on the easterly side of that street is closed to them, although that waterway is a navigable stream open to public use, even though the city owns the bed of the river.

There are added considerations which especially favor the position of the plaintiffs. They do not stand simply as property owners upon a public street complaining that a nuisance is maintained

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135 feet away. They were the owners of land in the city of New York, part of which was taken by that city under the power of eminent domain for the public purpose of creating Exterior street, and their especial interest in its proper maintenance was recognized by the commissioners in awarding compensation, and determining benefits by assessments upon them which they have paid. They have a particular interest in the maintenance of that street by reason of accessibility to the water front, which springs up from its creation, and any compensation awarded to them, and assessment burden, imply that the equivalents of reward and taxation are based upon the uses for a public street in the land taken, bounded by the navigable waterway.

Hence, to justify such an invasion of the rights of the private owner, the power must be expressly conferred by law, or arise by clear and unquestionable implication. Cogswell v. N. Y., N. H. & H. R. R. Co., 103 N. Y. 10.

This principle was applied in the case of the erection of a pump station causing noise and vibration. Morton v. Mayor, 140 N. Y. 207.

Also, in the case of the erection and use of a large coal pocket opposite plaintiff's premises. Spring v. Delaware, L. & W. R. R. Co., 88 Hun, 385.

The building by the city of a dumping station upon half of a pier owned by it was properly enjoined, not alone because of the unloading of refuse and garbage, but because of the exclusion from incidental consequence of the use of the other half by the private owner. Hill v. Mayor, 139 N. Y. 495.

Abutting owners may legally object to a diversion of the street use from its implied purpose. Lahr v. Metropolitan El. R. Co., 104 N. Y. 268; Story v. N. Y. El. R. R. Co., 90 id. 122.

In all cases of nuisance a complete remedy may be administered by the court in equity, and even the erection of a bridge in a public street of a city enjoined. Knox v. Mayor, 55 Barb. 404, Daniels, J.

The provisions of law, under which Exterior street was designed and legalized, do not carry the rights of the city beyond those which would otherwise be presumed to be their limit. The street was laid out under chapter 697 of the Laws of 1887 and amending acts of chapter 272, Laws of 1888, and chapter 257 of the Laws of 1889. The first section requires an exterior street

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to be laid out, and also to be completed. The second section directs the plan to be properly made and filed, which was declared by the act to be the sole plan for bulkhead, pier, basin, dock or slip, and forbade the erection of any wharf or street structure except according to the plan. Provision was made in the same section that the city might build or rebuild, or license such building or rebuilding, a temporary wharf structure to remain until the construction of the street should begin. But this provision was directly limited by section 4, which provided that the street, and the bulkhead forming the outer edge, should remain at all times a public exterior street or wharf for free and common use, except as otherwise provided. Nor should any structure be permitted outside the bulkhead line. There is no other provision in the act which allows the construction of a dumping plant outside of the bulkhead line.

We may fairly assume that the city had the right, both before and after the commencement of the construction of Exterior street, to build or rebuild a wharf; but the placing of one within the lines of a public street must be for street purposes and public uses, except so far as temporarily the use of that street is partially closed to the public for the very purposes of its construction and in aid of the ultimate purpose of a more perfect public use. The very case, cited to me by the counsel for the city, of Mayor v. N. Y. C. & H. R. R. R. Co., 69 Hun, 324, supports this reasoning rather than that of the counsel. By the opinion of Presiding Justice Van Brunt it was distinctly held that a grantor, who excepts a portion of land for a certain purpose, cannot be held to have conveyed that excluded because he afterwards devotes it to a different purpose from that indicated in the exception. This is undoubted law, and the opinion of the presiding justice was adopted by the Court of Appeals. 147 N. Y. 710. But this case does not hold that the grantee can take land in *invitum* for a public use, and then devote it to the creation of a nuisance, not contemplated within the purpose of the use whose necessity was the plea for the taking by legal force. The case strongly supports the theory that the implied reservation remains with the grantors of any other use than that for which they were compelled to surrender their lands.

Therefore, no temporary use was acquired by condemnation which is antagonistic to the permanent object for which the prop-

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erty was obtained, and the city cannot hold in suspense the duty of constructing the street, which it had the right to begin by the completion of the condemnation proceedings in 1897, for an unknown and indefinite time, under the plea of temporary privilege, to the destruction of private interests. It is always well to bear in mind that the court should not substitute its power for that of the executive branch of the government, or hamper the exercise of the discretion and judgment of that executive power which often acts under the constraint of difficult practical problems; but the duty of action is always obligatory upon the court for the preservation of the rights of the citizen which are assured and protected by law.

Let injunction go against the maintenance of the dumping board, to be operative within ninety days after service of a copy of the judgment, with costs to the plaintiffs.

Ordered accordingly.

THE NEW YORK CARBONIC ACID GAS CO., Plaintiff, *v.* THE GEYSER NATURAL CARBONIC ACID GAS CO., Defendant.

(Supreme Court, Saratoga Special Term, August, 1901.)

Easement — Way of necessity, not located — Reservation — When the court may locate — Route — Right to lay a pipe beneath its surface — Injunction.

In 1889 one Wiswall conveyed to E. and H. Hathorn, grantors in June, 1896, of the plaintiff, three acres surrounded by Wiswall and other lands and from a spring on the three acres the plaintiff subsequently obtained gas which it collected at the mouth of the spring, compressed into a liquid at its works at a distance, and sold to the trade. In April, 1896, Wiswall, reciting that it had been his intention to do so in 1889, conveyed to the Hathorns a right of way from the three acres "over the space between said lands, the bridge and broken road to and over said road" to a certain avenue. The bridge and "broken road" were on his lands and the avenue ran past the plaintiff's compressing works, situated on Hurlburt lands, and formed a boundary of the works. The "broken road" had already been used by divers grantees of the Wiswall tract to pass from their lots

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to said avenue. In 1893 Wiswall had conveyed to the defendant's grantors adjacent lands and expressly declared them subject to a right of way to the Hathorns, their heirs and assigns, "over the broken road as it now exists" to and from the lands he conveyed them in 1889, the deed of which had been recorded in 1889. The plaintiff now brings this action to have a right of way established as it had adopted one — over the "space", now of the defendant, and over the "broken road" to the avenue — and to restrain the defendant, a competitor in business, from tearing up a pipe the plaintiff had laid, or was trying to lay, over this route so as to carry gas from its spring to its compressing works.

Held, that, upon a construction of the deeds and from the necessity of the case, the plaintiff was entitled to a right of way over the "space" to the "broken road" as well as over that road; and that the fact, that the lands now of the plaintiff were at the time of Wiswall's grant surrounded in part by his lands and in part by those of a third person, did not diminish the plaintiff's right to a way.

That, where the grantor had not located the way, the grantee had a right to do so, but that as the parties had not located it effectively the court could and would do so.

That the plaintiff must proceed in a reasonably direct way across the "space" to the "broken road" and along the latter to a point near the compressing works without again entering, from that road, upon the defendant's lands and must go around an addition, to a grist mill, constructed before the plaintiff claimed its present location.

That the plaintiff also had a right to lay a two-inch pipe, for conducting gas, over the whole route, on the surface, or might sink it below the frost line, and that interference with the pipe, when laid, should be and was enjoined.

ACTION to procure the establishment of a right of way, as the plaintiff had adopted it, and for an injunction restraining the defendant from tearing up a pipe, which the plaintiff had laid, or had attempted to lay, beneath the right of way adopted by it.

Edgar T. Brackett, for plaintiff.

James W. Verbeck, for defendant.

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RUSSELL, J. The subject of this controversy is the right claimed by plaintiff to transport liquid carbonic acid gas, from its own mineral springs in the town of Saratoga Springs over the defendant's adjacent lands, to a point of access to plaintiff's additional lands on which it has erected valuable works for the compression of fluid gas into liquid form for commercial purposes. The privilege is a valuable one, the defendant asking the plaintiff $600 per year for its use at the present time, and denying that the plaintiff has any right to such use however much or little that use may interfere with the defendant's enjoyment of its own property. The parties are competitors in business and defendant has the right to refuse to allow *ex gratia* even that which cannot seriously interfere with its own business, provided the plaintiff has not a just claim to an easement from necessity, reservation or grant.

The parties take title from a common source. October 12, 1889, Eugene Wiswall conveyed about three acres to Emily and Frank Hathorn, near the spot known as the Geysers in Saratoga Springs, and on the 1st day of April, 1896, also conveyed to them, after reciting that it was the intention of Wiswall at the time of the conveyance in 1889 to grant the right hereafter described, an easement characterized in the following words: "The said right of way from said lands described in said deed to them over the space between said lands, the bridge and broken road to and over said road to said Coesa avenue." On the 6th day of June, 1896, Emily and Frank Hathorn conveyed to the plaintiff the lands previously granted to them by Wiswall. Thus, whatever title and appurtenances Wiswall conveyed to the Hathorns in 1889, and whatever reserved interest he conveyed to them April 1, 1896, the plaintiff now possesses, undiminished by any conveyances from Wiswall to other persons subsequent to his original deed to the Hathorns.

The interest of the defendant in its lands adjacent to those of plaintiff comes through a conveyance by Wiswall to Lyman F. Pettee and others, made on the 7th day of January, 1893, following a contract of purchase between the same parties executed April 28, 1892. In that deed to Pettee the grantor incorporated this provision: "Subject also to a right of way to Emily H. and Frank H. Hathorn, their heirs and assigns, over the broken road as it now exists to and from the lands conveyed to

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them by said Wiswall by deed, dated October 12, 1889, and recorded October 22, 1889, in Book No. 186, page 456." On the 1st day of March, 1895, Pettee and others conveyed to the defendant the lands which Wiswall had deeded to them, this conveyance being prior to the grant from Wiswall to the Hathorns of the right of way. The reservation, however, contained in the deed to Pettee and others was in a recorded deed, of which the defendant had presumptive notice.

The broken road referred to had been used from Coesa creek to Coesa avenue, which avenue partly bounds the easterly and distant part of the plaintiff's lands called the Hurlburt lands on which are erected the plaintiff's tank and compressing works. It had been used to some extent by the owners of the Wiswall lands for communication between their lots and Coesa avenue. The whole Wiswall tract was not very valuable at the time of his ownership, but the region was recognized as a spot in which mineral springs might be discovered, several near by being already known and made useful. There was, therefore, at the time Wiswall conveyed to the Hathorns, who were interested in mineral springs at Saratoga Springs, the possibility of future discoveries by exploration, the anticipation of which was justified by the discovery which plaintiff made, after it acquired the ownership of the Hathorn three acres, of a new spring largely productive of the carbonic acid gas used to make mineral waters sparkling and attractive. That spring spouts some thirty-five cylinders of gas per day, and its transportation to the plaintiff's works on the Hurlburt tract does not require the use of vehicles or the carriage of the water in liquid form, for it is separated at the mouth of the spring from the water and may be carried through pipes as a fluid to the compresser where it is turned into liquid. At the time of the Wiswall deed to the Hathorns the lands of other parties adjoined the Hathorn lot, but no right or possible power over them existed in Wiswall or his grantees. There was a necessity for the use of the broken road in the enjoyment of the Hathorn tract conveyed by Wiswall. That broken road lay on the lands of the grantor, Wiswall, and no denial of the privilege or right to use it appears in the case, so that presumptively during Wiswall's tenure of the lands now owned by the defendant the Hathorns had free access to and over the broken road to Coesa avenue. As against Wiswall,

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therefore, the appurtenant right of passage by the Hathorns existed in their favor, and his acquiescence cotemporaneously with his ownership forms a part of the *res gestae* in determining the assumed rights of the plaintiff at a time when no controversy existed. That right of the Hathorns was further distinctly recognized by Wiswall in his deed to Pettee and others, who are the grantors of the defendant, by its reservation of the right of way to the Hathorns, and by his subsequent conveyance to them of all the rights which he had preserved by the deed in which he parted with his title to the defendant's lands.

The appurtenant right of way which arises by necessity is not defeated by the fact that the land conveyed is surrounded in part by that of the grantor and in part by that of a third person. Palmer v. Palmer, 150 N. Y. 135.

It was the duty of Wiswall, in conveying his remaining land to other persons, to recognize the obligations to other grantees, and, therefore, his reservation in the deed to Pettee was not for his own personal benefit, but, from the underlying situation and his own expressed language, was for the protection of those prior grantees, and in recognition of his own duty. This distinction is recognized by our courts. Equitable Life Assurance Society v. Brennan, 148 N. Y. 661; Lattimer v. Livermore, 72 id. 174; Hay v. Knauth, 36 App. Div. 612.

When so intended, the reservation is an exception from the thing granted, of which an adverse grantee must take notice. West Point Iron Co. v. Reymert, 45 N. Y. 703.

The situation of the Hathorn lot, the conveyance to the Hathorns, the reservation in the deed to Pettee, the conveyance of the reserved right which Wiswall had, and the use of the broken road, therefore, give the plaintiff's lot the dominant appurtenant right of way and make the defendant's tract the servient tenement. The owners of the title to either tracts have never definitely located the easement. The grantor undoubtedly had the right to locate, fairly exercising that right, and in case of his neglect or refusal the grantee had also such a privilege. Palmer v. Palmer, 150 N. Y. 139.

That choice has not effectively been made by either side. It remains, therefore, for the court to consider from the terms of the reservation, and the situation upon which that reservation was based, what should be the location. Such power exists in

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a court of equity. Trustees of Columbia College v. Lynch, 70 N. Y. 440.

The use must be with due regard to the interests of the defendant, and with as little disturbance to the enjoyment of its property as may be practicable. Such use, however, must be of substantial utility. The right to pass over the broken road would be a mockery if the plaintiff could not reach the broken road without a trespass upon the defendant's lands. Hence the need of passage to the broken road for any possible enjoyment of the easement. The plaintiff must proceed in a reasonably direct route across the defendant's lands to this broken road, and along the same to such point as may be near its own works upon the lands owned by it, without again entering from that broken road upon the defendant's lands. I do not think it necessary to remove the addition to the gristmill which was constructed before the plaintiff sought the location it now claims. It is practicable to go westerly around the building.

It is strongly urged by the defendant's counsel that the privilege of passage means purely a passage over the lands and broken road, and does not extend to the laying of pipes within the protection of the soil. It would seem that a two-inch pipe, placed out of sight, would not in the slightest degree vex or disturb the defendant in the use it makes of its own land, and that an occupation by horses and drags with heavy loads would be to the defendant a matter of more serious disturbance. But I cannot agree with the position taken by the defendant in this respect. The right of passage to transport commodities is a right which is adapted to a reasonable use under the varying conditions of business life, and is not measured by the exact form of the transporting vehicle or the number of times it is used. Such an easement is a grant of practical benefit so far as is consistent with the purpose of the thing granted, and not destructive to the rights of the owner of the servient tenement. Arnold v. Fee, 148 N. Y. 214; S. C., 87 Hun, 502; Beals v. Stewart, 6 Lans. 408.

The plaintiff would have a right to lay the pipe upon the surface of the ground to the broken road, and then along that road, and, as the right over the defendant's lands arises from necessary implication to reach the broken road, a reasonable application of that necessity would give the plaintiff the power to bury

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the pipe as far as the broken road; and I also hold that the passage over the broken road does not merely refer to the surface under the circumstances as they exist, but may extend to the removal of an obstruction to the passage of other parties by laying it beneath the ground and out of sight, even below the frost line.

That a varying use, exercised, with all reason and adapted to current exigencies, flows from an easement is held by courts of other States. "As usually occupied" follows the future common usage. Sargent v. Hubbard, 102 Mass. 380.

The necessities of the future determine the use, and not that use in vogue at the time of the grant. Whittier v. Winkley, 62 N. H. 338.

Stone from a discovered quarry may be transported, though the land was used for agricultural purposes at the time the easement was granted. Abbott v. Butler, 59 N. H. 317.

Kindred cases are reported as cited below. Holt v. Sargent, 15 Gray, 97; Walker v. Pierce, 38 Vt. 94; Gunson v. Healy, 100 Penn. St. 42; Johnson v. Kinnicutt, 2 Cush. 153.

Even the right to build a railway may be implied. Dand v. Kingscote, 6 M. & W. 174.

I do not think that the terms of the reservation in conveyances by Wiswall to persons not parties to this litigation affect the rights of either, nor that the terms of the contract to Pettee in 1892, that the lands were to be subject to the reservations contained in deeds, limit the plaintiff's right. Pettee did actually take a deed in 1893 with a reservation to the Hathorns, as therein expressed, with no apparent protest, and the circumstances indicate that the grant to the Hathorns of the easement, as recognized in the Pettee deed by the reservation, was overlooked by the parties at the time the Hathorn deed was given.

Upon an appeal from an order for a temporary injunction in this case, the Appellate Division granted a reversal, holding that it was premature to determine the practical location of the easement, even if the right existed, and the opinion makes some pertinent suggestions as to questions arising upon the general controversy. N. Y. Gas Co. v. Geyser Co., 55 App. Div. 128. I infer that the interlocutory question was decided by the Appellate Division upon the papers presented upon the motion in the usual manner, with no rebutting evidence explanatory of matters stated in the defendant's answer and affidavits or map. The tes-

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timony and exhibits now produced upon the trial show a more variant and enlarged view of the entire situation.

Judgment is directed in favor of the plaintiff allowing the laying of the pipe as indicated, and enjoining interference therewith, and for costs of the action. The court does not determine any question not before it, and, therefore, awards this judgment, without the expression of any conclusion as to whether the location, to be established for the purpose indicated, is exclusive of any other privilege of passage for vehicles or otherwise in the future.

Judgment accordingly.

THE PEOPLE ex rel. THE MONTICELLO TELEPHONE CO., Relator, v. THE BOARD OF TRUSTEES OF THE VILLAGE OF MONTICELLO, Defendant.

(Supreme Court, Sullivan Trial Term, August, 1901.)

Telephone corporation — How far the discretionary power of village trustees over poles and wires may be controlled by the court — Motion papers, for a mandamus, which failed to show a relator — L. 1890, ch. 566, § 102; 1897, ch. 414, § 89, subd. 9; Code C. P., § 1994.

Notwithstanding the fact that the Transportation Corporations Law gives a telephone company a franchise, direct from the Legislature, to use the public streets for constructing and maintaining its lines, the Village Law gives village trustees power to regulate the erection of the poles and the stringing of the wires, and as this latter power involves discretion, the Supreme Court, while able to compel its exercise in a proper case, cannot by mandamus control the particular method of the exercise.

Where it appeared that village trustees had materially embarrassed or prevented a telephone company in its legal right to use the village streets and had long delayed passing any ordinance in the matter, the court refused to grant the company, in the first instance, a peremptory writ of mandamus requiring the trustees to grant it a permit to erect poles, string wires and conduct business in the village,

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but gave it leave to renew the motion on other papers if the passage of such an ordinance should be unduly delayed.

In view of the provisions of Code C. P., § 1994, that a State writ awarded upon the application of a private person must show that it was issued upon the relation of that person, the defect, in the motion papers of the company, that they are entitled only in the name of "The People" and do not name the company as relator or in any manner, is a mere irregularity which does not diminish the right to the writ, upon a proper case made, and cannot in such case preclude its subsequent issue in the form required by the Code.

APPLICATION for a peremptory writ of mandamus.

John D. Lyon, for relator.

Charles H. Stage, for defendant.

CHESTER, J. A preliminary objection is made to the granting of this application on the ground that the moving papers are entitled in the name of "The People" without a relator.

I think this defect in the moving papers is unimportant, because no writ has been issued, and if the court allowed a writ to issue upon the application of this company it would only permit it to issue with the company as relator as required by section 1994 of the Code of Civil Procedure.

The company asks for a peremptory writ requiring the defendant to grant to it a permit to erect poles, string its wires and conduct its business in the village of Monticello according to the terms of its written application presented to the board of trustees of such village.

The laws defining the rights of telephone companies and the powers of the boards of trustees of villages seem reasonably clear. The Transportation Corporations Law (L. 1890, ch. 566, § 102) gives to telephone companies the right to erect, construct and maintain the necessary fixtures for their lines upon any of the public roads, streets and highways within the State. And this has been held to be a franchise directly from the Legislature to the corporation, to use the public streets for constructing and maintaining its lines. Barhite v. Home Telephone Company, 50 App. Div. 25. But, notwithstanding this, the Village Law

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(L. 1897, ch. 414, § 89, subd. 9) confers upon boards of trustees of villages power "to regulate the erection of telegraph, telephone or electric poles, or the stringing of wires in, over or upon any of the streets or public grounds." This is a power involving discretion upon the part of the board of trustees and the exercise of this discretion cannot be controlled by mandamus. While the courts can compel the exercise of the power the particular method of its exercise cannot be controlled by mandamus. People ex rel. Harris v. Commissioners, 149 N. Y. 26.

Manifestly neither the court, nor the board of trustees of the village has any right to grant the request of this company to string its wires upon poles belonging to other companies, as appears by the application filed by the company with the board of trustees it has requested the privilege of doing.

It appears very clearly here by the papers used on this application that the board of trustees have sought to either prohibit entirely or to embarrass the telephone company very materially in its rights to use the streets for the purposes of its company and have delayed passing any regulations for that purpose a long time. It was not unreasonable, however, for the trustees to require the filing with them of a map by the telephone company showing where it desired to locate its lines and poles before passing an ordinance regulating their erection.

I have concluded, after examining the papers presented, to deny this motion for a peremptory writ of mandamus, without costs, and to grant leave for a renewal of the application upon other papers if the passage of such ordinance should be unduly delayed.

Motion denied, without costs, with leave to renew application upon other papers.

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Matter of the Petition of ELLEN McMANUS, as Administratrix *de bonis non* of ANTHONY McKNIGHT, Deceased, to Compel a Judicial Settlement of the Accounts of JOHN J. HARRIGAN, the Deceased Administrator of the Goods, Chattels and Credits of ANTHONY McKNIGHT, Deceased.

(Surrogate's Court, Albany County, August, 1901.)

Surrogate's Court — Decree on accounting opened for newly-discovered evidence explaining why the funeral expenses of a testator were so large and why a note due him had not been collected — Costs — Code C. P., § 2481, subd. 6.

The surrogate may in his discretion open a decree upon the ground of newly-discovered evidence but will do so only where the evidence is likely to change the result, is material, is not cumulative and could not have been obtained on the former trial or hearing by the moving party by the exercise of reasonable diligence.

Where representatives of a deceased administrator, whose account had been surcharged with funeral expenses deemed excessive by the surrogate and with the amount of a promissory note due the testator, maturing soon after his death and never enforced nor collected, subsequently offered to produce to the court legal evidence that the intestate himself had selected an elaborate and expensive casket for his burial, had had it reserved for him and was buried in it, and further offered to show by the endorser of the note that both he and the maker were insolvent at its maturity, that certain other judgments against them apparently paid by them were not in fact so paid, and that the endorser had been out of the State of New York for most of the time since the maturity of the note, and the representatives further showed that knowledge of these matters had come to them since the decree and shortly before their application to have it opened, the surrogate opened the decree on payment by them of costs.

MOTION by the personal representatives of the estate of John J. Harrigan, deceased, under subdivision 6 of section 2481, Code of Civil Procedure, to open the decree heretofore entered herein and

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for a new hearing upon two of the issues litigated in this proceeding.

J. H. Clute and E. J. Meegan, for motion.

John J. McManus, opposed.

FITTS, S. This is a motion made by the personal representatives of the estate of John J. Harrigan, deceased, under subdivision 6 of section 2481 of the Code of Civil Procedure, to open the decree heretofore entered herein and for a new hearing upon two of the issues litigated in this proceeding. The authority, subdivision 6 of section 2481 of the Code of Civil Procedure, under which it is claimed this court has the power to grant the desired relief, is as follows:

"Section 2481. A surrogate, in court or out of court, as the case requires, has power * * * Sub-division 6. To open, vacate, modify, or set aside, or to enter, as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The powers conferred by this subdivision, must be exercised only in a like case and in the same manner, as a court of record and of general jurisdiction exercises the same powers. Upon an appeal from a determination of the surrogate, made upon an application pursuant to this subdivision, the general term of the supreme court has the same power as the surrogate, etc."

The intestate, Anthony McKnight, died at the city of Albany, N. Y., on the 14th day of April, 1889, intestate; thereafter, and on the 20th day of April, 1889, letters of administration were issued upon the petition of Ellen McManus to John J. Harrigan of this city. Mr. McKnight, at the time of his death, was unmarried, and left him surviving no ancestors and no descendants; his estate consisted of personal property and principally of money in the savings bank, and was of the value of about $5,000. He resided, at the time of his death, on Canal street, this city, a short distance from the undertaking rooms of John Harrigan's Sons, and the funeral services were held from the rooms of said firm and were performed by them, and, after the appointment of the administrator, John J. Harrigan, who was a member of the above-named firm,

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a claim for the same was presented to him, amounting to $352.52, which was paid shortly thereafter. The firm of John Harrigan's Sons consisted, at that time, of the administrator, John J. Harrigan, Daniel S. Harrigan, Harvey T. V. Harrigan and Joseph F. Harrigan; John J. Harrigan died in the year 1893, leaving a last will and testament, which was admitted to probate, and the persons named therein as executor and executrix respectively, viz: Harvey T. V. Harrigan, his brother, and Ellen E. Harrigan, his sister, qualified and entered upon the discharge of their duties. Thereafter and during the year 1896, Mrs. McManus was appointed administratrix *de bonis non* of the estate of Anthony McKnight, deceased, and shortly thereafter commenced a proceeding in this court to compel the personal representatives of the estate of John J. Harrigan to account for the property of Anthony McKnight, which had come into his possession as such administrator. Such proceedings were subsequently had that the personal representatives of John J. Harrigan filed an account in this court in this proceeding; specific objections were taken to said account by the administratrix *de bonis non* who objected to certain items of disbursements claimed to have been made by the administrator in the course of his administration of the estate; objections were also taken to the amount paid for the funeral expenses, claim being made that it was excessive, and also to the failure of the administrator to collect the amount due upon a promissory note, held by Mr. McKnight in his lifetime, made by one William Kelly and endorsed by his brother, Henry Kelly, and which became due after the death of Mr. McKnight, the claim being made that if the administrator had proceeded with diligence to collect the claim the same could have been collected, and that by reason of his failure to take the necessary steps to procure its collection, the estate of McKnight had been lessened to the extent of the amount due upon the note together with its accumulated interest. Upon the trial of the issues thus raised considerable testimony was taken; with reference to the funeral expenses it appeared that the amount charged for the casket was $175; in explanation of the reason why such an elaborate and expensive casket had been procured, Mr. Harvey T. V. Harrigan, one of the accounting parties herein, was sworn as a witness and gave testimony with reference to the same; he testified that, but a short time prior to his death, Anthony McKnight called at their undertaking rooms and examined the casket

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in which he was subsequently interred, stating that he desired to be buried in the same and asked them to furnish that particular casket for his funeral. Objection was taken to the receipt of this testimony under section 829 of the Code of Civil Procedure, but the objections were overruled and the testimony was received. Upon the determination of this matter, in announcing my decision, I stated that my attention had been called to a recent decision in the Court of Appeals holding that the witness was incompetent to give testimony of this character and that in the determination of the issues involved I should disregard the testimony; I accordingly held that the sum of $200 was a reasonable charge for the funeral expenses of the deceased, reduced the amount of the funeral expenses to that extent and surcharged the account with $150.52. It appeared from the testimony that the note made by William Kelly and endorsed by Henry Kelly, and which became due after the death of Anthony McKnight, was for $600, and indicated a loan to that extent previously made by McKnight to Kelly; that the note became due a short time after the death of McKnight but that no steps were taken towards its collection until about eighteen months after its maturity; that then action was commenced upon the same by Mr. Meegan, for the administrator, and judgment subsequently recovered thereon and execution issued and returned unsatisfied. No explanation was given why the administrator had failed to take any steps looking to the enforcement of this claim prior to the time it was placed in the hands of Mr. Meegan, and no testimony was given showing either the solvency or insolvency of the maker or indorser, while it appeared that subsequent to the maturity of this note and prior to the commencement of the action for the collection thereof, judgments aggregating $7,000 or $8,000 were docketed against the maker and endorser, executions issued thereon and returned unsatisfied. I found from the testimony that the administrator had been negligent in not enforcing the payment of this note and surcharged his account with the amount thereof together with the interest thereon from the time of its maturity up to the time of the entry of the decree herein. The decree in this proceeding settling and determining the accounts was entered in this court on the 25th day of April, 1900. On the 11th day of March, 1901, the personal representatives of the deceased administrator made a motion in this court to open the decree heretofore entered herein and for a

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new hearing upon the two issues above set forth, upon the ground of newly discovered evidence. The affidavits upon which this motion was based were made by Harvey T. V. Harrigan, James Fogerty and Henry Kelly. Mr. Harrigan in his affidavit stated that he is the active executor of the estate of John J. Harrigan, deceased, and that within a short time prior to the making of the motion he had learned that one James Fogerty was present at the undertaking rooms of the firm of John Harrigan's Sons, 21 Canal street, this city, and heard a conversation between McKnight and John J. Harrigan, with reference to the purchase of a casket in which he was subsequently interred; that the conversation occurred a short time prior to the death of said McKnight and that he expected that Fogerty would give testimony with reference to the matters set forth in his own affidavit which forms part of the moving papers. In the accompanying affidavit of said Fogerty he avers that he was at the warehouse aforesaid upon the occasion referred to in the affidavit of Harvey T. V. Harrigan, and while there McKnight entered with a man by the name of Hughes; that McKnight said to John J. Harrigan that he came in with Mr. Hughes to select a casket and wanted said Hughes to see the casket he should select; that McKnight pointed out a particular casket and said he wanted that one and none else; that Mr. John J. Harrigan said that was pretty expensive, to which McKnight replied he didn't care, that he wished that one and Mr. Hughes remarked it was none too good for his old bones; that Mr. John J. Harrigan then said that it was all right; that he would keep it for him and he should be laid out in it; McKnight then said, all right, that is a bargain; that subsequently he saw McKnight after his death and noticed he was laid out in the casket he had selected during his lifetime and was buried in it. There was also submitted upon this motion, the affidavit of Henry Kelly, in which he stated that at the time of the maturity of the note given to Anthony McKnight by William Kelly and endorsed by him, to wit, July 1, 1890, that he was insolvent and unable to pay said note, as was also the maker of said note. That the judgments against William Kelly and Henry Kelly, which were docketed and entered after the maturity of this note were not paid by him; that since 1891 he has been mainly out of the State and prior to December, 1900, he was continuously out of the State for about a year. The moving papers also develop the fact that the acting executor was unaware

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of the matters and things set forth in the affidavit of Henry Kelly until the same was taken on the 8th day of March, 1901.

In determining cases of this character the courts have adopted certain salutory rules which are set forth in the elementary works and also in reported decisions. In Graham and Waterman on New Trials (vol. 3, 1016), the learned authors give the following definition of newly discovered evidence: "By newly discovered evidence is meant proof of some new and material fact in the case, which has come to light since the verdict." And further, at page 1020 of the same volume in giving a further elucidation of the rule, stated the same as follows: "If a case has gone against a party, simply because a portion of his evidence, without any fault of his, has remained latent, so that the truth has been obscured what is more evident than that the truth ought to be vindicated by a second trial. It would be as wrong to permit, under such circumstances, the successful party to enjoy his advantage, obtained not upon his own strength, but upon the weakness of his opponent, as to permit the latter to suffer without redress." The grounds which move the court in such cases are distinctly stated in a recent case, as follows: "In order to make out a case for a new trial upon the ground of newly discovered evidence, it must appear, first, that it has been discovered since the trial and could not, with reasonable diligence, have been obtained upon the trial; 2nd, that it is material to an issue involving the merits; 3rd, is not cumulative, and 4th, that there is a reasonable certainty that if offered before, it would have changed the result." Roberts v. Johnstown Bank, 38 N. Y. St. Rep. 563.

The same rules are further set forth in Glassford v. Lewis, 82 Hun, 46, where the court said: "Motions to set aside verdicts as contrary to the evidence, as well as motions for a new trial upon the ground of newly discovered evidence, are not governed by any well defined rules, but depend in a great degree upon the peculiar circumstances of each case. They are addressed to the sound discretion of the court, and whether they should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view solely the attainment of that end" and they should be liberally granted in the furtherance of justice. Also "Upon a motion for a new trial on the ground of newly discovered evidence, it must appear that the evidence was discovered since the trial; that it could not have been obtained upon the

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former trial by the exercise of reasonable diligence; * * * that it is not merely cumulative and that its character is such that it would probably have changed the result. When these facts appear, and the court is satisfied that the ends of justice will be promoted by allowing the moving party an opportunity to present the newly discovered evidence, the motion will be granted." Also, to the same effect, "Motions for new trials are addressed to the discretion of the court whether based upon the weight of evidence, surprise or newly discovered evidence, or the fact that the party has been deprived of his evidence by accident or other like grounds, and in modern practice they are liberally granted in the furtherance of justice." In People v. Baker, 27 App. Div. 597, the same being an appeal from an order granting a new trial, the court, in delivering the opinion, said: "The learned trial judge tried the case fairly and impartially. He knew the witnesses and he was in a better situation to judge than we can be, from the surroundings and atmosphere of the trial, of the strength and *bona fides* of the motion for a new trial. The granting or refusing of it was very largely in his discretion, and we cannot say that that discretion was abused; and in this case as in all others the motion for a new trial upon the ground of newly discovered evidence is not governed by any well defined rule, but is addressed to the sound discretion of the court, and whether it should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view, solely, the attainment of that end." In defining what constitutes reasonable diligence, as applied to motions of this character, the court held, in Bonynge v. Waterbury, 12 Hun, 534, as follows: "The law exacts from parties and their counsel in the trial of an action only reasonable diligence, and when that has been observed, and notwithstanding its exercise, material evidence, not of a cumulative character, which would probably change the result, has eluded their discovery, and is subsequently discovered, a proper case is presented for a new trial."

Tested by these rules, I think this motion should be granted; the testimony certainly is material, is not cumulative, the moving parties have exercised reasonable diligence in obtaining the same, taking into consideration the fact that the administrator who had personal knowledge of these matters and could give explanations with reference to them is dead, and that the facts with reference

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to which the testimony relates if proven upon the trial would probably affect the result heretofore reached. If the Kellys were insolvent, as a matter of fact, then certainly the estate of John J. Harrigan should not be charged with the amount of this note. In defining active vigilance on the part of personal representatives of a deceased, Judge Peckham in O'Conner v. Gifford, 117 N. Y., at page 279 lays down the law as follows: "Active vigilance is a relative term, and what it is depends upon the facts appearing in each case. * * * A debt being proved the presumption is that it is collectible, as solvency, and not the contrary, is to be presumed. But when the *onus* being shifted to the executor, is met by proof on his part of the absolute, irretrievable and hopeless insolvency of the debtor, does any rule of active vigilance demand the institution of legal proceedings by the executor against such insolvent debtor? * * * All the facts being in, the question arising for determination is whether the conduct of the executor has been guided by good faith, reasonable judgment and an intention to fairly and fully discharge his duty. If so, it cannot be that he should still be held liable for a *devastavit*."

The motion of the petitioner is, therefore, granted, opening the decree heretofore entered herein and providing for a new hearing upon the two issues mentioned and set forth in this petition, upon condition that the costs which are hereby fixed at $70 be paid to the respondent upon this motion within the period of five days from date hereof; if not paid within said period of time, then this motion is denied.

Decreed accordingly.

Matter of the Estate of Cossuth L. Georgi, Deceased.

(Surrogate's Court, New York County, August, 1901.)

Surrogate's Court — When a petition to sell real estate for debts need not show the value of each parcel — Citation, service and jurisdiction — Amendment — Terms of sale — Payment.

In a proceeding to sell the real estate of a decedent for the payment of his debts, the petition need not state separately the value of each parcel where the parcels lie together.

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Where parties named in the citation have been served with it, the omission of the Christian names of some of them and the failure to state the individual names of others, who were partners in firms cited, may be cured by amendment.

Service of the citation upon tenants of the decedent's real estate, not named in the citation, does not confer jurisdiction of the tenants.

Where parties named in a citation die before service of it is made upon them, service of a citation in the same form upon their personal representatives does not confer jurisdiction of the parties deceased.

Where the real property of the decedent is subject to a mortgage also covering the property of other persons, a sale, upon the announced terms, that the holder of the mortgage has consented that the purchaser may pay it off and that such payment will be allowed *pro tanto* in the proceeding as a deduction from the bid, is legal, and a purchaser, who signed the agreement of sale, cannot avoid the sale for such an arrangement as to payment.

PROCEEDINGS to sell real estate for the payment of debts.

John Aitken, for petitioner.

Daniel Daly, for purchaser.

James M. Fisk, for Bowery Bank and certain creditors.

FITZGERALD, S. The questions at issue between the parties hereto I dispose of as follows: 1. The first subdivision of the first objection interposed by the purchaser herein is overruled in view of section 2759, subdivision 3, taken in connection with section 2752, Code of Civil Procedure. 2. The objection as to the petitioner not giving the value of the different parcels of real estate is overruled. Matter of McGee, 5 App. Div. 527. 3. As the disposition of the other parcels referred to in the second subdivision of the first objection and the proceeds thereof are subject to the jurisdiction of the Supreme Court in the partition action (Matter of Dusenbury, Surr. Decs., 1901, p. 233; 34 Misc. Rep. 666), and as the heirs of the decedent and the parties to this proceeding, other than the objectant, take no exception to the al-

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leged defects complained of by him, his objection is overruled. 4. The objection to the citation of Anderson is cured by the appearance of his attorney and the disclosure of his name as Andrew Anderson. 5. As to the other parties referred to in the third and fourth subdivisions of the first objection, who were concededly named in the citation and the same served upon them, the objection is to the omission of the Christian names of some of them and the failure to give the individual names of others of them composing business firms. This objection is overruled. An amendment, if necessary, can be made to cure the alleged defect. Stuyvesant v. Weil, 167 N. Y. 421. 6. Besides the objection to the defect in the names of others mentioned in the fourth subdivision of the first objection, who are tenants of the property, it appears that they were not named in the citation herein, although a copy of the same was served upon them. This service, in my opinion, was ineffective to give the court jurisdiction over them. 7. Two of the parties named in the third subdivision of the first objection died before the service of the citation upon them, and no citation was issued to their representatives, although the latter have been served with the citation, in which they were not named. The omission of their names from the citation made the service thereof ineffectual to give the court jurisdiction over them. See Boerum v. Betts, 1 Dem. 471. 8. The sixth subdivision of the first objection is overruled. While the petitioner does not literally comply with the statute, I do not regard this as a substantial defect. 9. The seventh subdivision of the first objection is overruled for the reason stated in overruling the sixth subdivision of the first objection. 10. The fifteenth subdivision of the first objection is overruled, it having been obviated by new proof of publication recently filed. 11. The objection that the property was sold subject to a mortgage which partly covered other property not belonging to the decedent is overruled. By the terms of sale it was in substance stated that arrangements had been made with the holder of the mortgage by which the purchaser would be enabled to pay off the same, and that the payment would be allowed as a deduction from the amount bid by the purchaser. It is not claimed that there has been any obstacle to carrying out this arrangement or to the paying of the mortgage by the purchaser. The sale made was regularly confirmed and all parties,

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including the purchaser, received notice of the application for the confirmation of the report of sale. None of the parties in interest other than the purchaser raise any objection as to the manner of sale, and he having by his purchase and the agreement of sale signed by him agreed to the terms of sale, and it nowise appearing how he could be injured if he complied with them, I do not think he is in any position to raise the question which he presents as to the regularity of the sale. 12. The objections not hereinbefore specifically sustained are overruled. 13. For the reasons stated in paragraphs six and seven in sustaining the objections therein mentioned, the administrator's application is denied and that of the purchaser granted.

Application of administrator denied, and that of purchaser granted.

Matter of the Estate of HENRY B. BOLTON, Deceased.

(Surrogate's Court, New York County, August, 1901.)

Transfer tax — Penalty for delay remitted for the time during which the fund has been in litigation — Notice of appraisal — Report.

A penalty for delay in paying the transfer tax should be remitted for so much of the delay as has been caused by the fact that the fund was in litigation.

An appraisal is not regular where the record does not show that the proper officers representing the People have had due notice.

The report of an appraiser must show the grounds of his findings.

APPLICATION for the remission of a transfer tax penalty.

A. Oldrin Salter, for estate.

No other appearance.

FITZGERALD, S. The suspension of the tax proceeding until the determination of the litigation referred to in the moving papers furnishes abundant reason for granting the application for the

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remission of the penalty. Interest upon the tax fixed will be charged at the rate of 6 per cent. per annum from the date of accrual up to the 1st day of March, 1899, from which date the penalty at the rate of 10 per cent. will be charged. This proceeding was instituted by the district attorney. During the suspension of the appraisal the petitioner went out of office. The order appointing the appraiser directed him to notify the comptroller of the city of New York of the time and place of the appraisal, but the proof of service does not show that this direction was complied with, nor does the record show any appearance on behalf of the State. The sole asset consisted of shares of stock in a corporation, and the appraiser adopted the opinion of the president and treasurer of the company as to its value. The basis of these opinions is not given, and there is virtually no foundation for the finding of the appraiser. Under the circumstances I shall direct that a new appraisal be made by one of the official appraisers, who shall issue new notices to the parties entitled thereto, including the State Comptroller and the present district attorney. Upon the conclusion of the proceeding an appropriate decree may be presented, of which the petitioning district attorney and the present incumbent of the office should have notice in order that their respective claims to costs may be adjusted.

Decreed accordingly.

Matter of the Contested Will of HELEN C. BRUSH, Deceased.

(Surrogate's Court, New York County, August, 1901.)

Will — Belief in Christian Science — Peculiar beliefs when not insane delusions — Presumption of undue influence subject to rebuttal — When a religious society may take under a will made within two months of death — R. L. 1813, ch. 60; L. 1848, ch. 319, § 6.

A belief in Christian Science, when founded on religious convictions, is consistent with testamentary capacity and beyond the scope of judicial inquiry.

The fact, that a sincere believer therein left her home and her sisters and lived apart from them because she believed that they persecuted her for her peculiar views — which they ridiculed and to

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which they were strongly opposed — does not necessarily show, even though she may have exaggerated their conduct, that she was subject to an insane delusion in the matter, nor can a will, subsequently made by her and by which she revoked a former will and gave the bulk of her estate to a Christian Science church, be set aside for that reason.

A belief, in certain miraculous powers ascribed to Christian Science, not acted upon by her and her belief that that science had cured her of disease, cannot be deemed insane delusions, avoiding the will.

The presumption of undue influence, which arises where a beneficiary of a will is a stranger and occupies a position confidential to the testatrix, is one of fact only and therefore may be overcome by evidence.

A religious society, incorporated under the act of April 5, 1813 (R. L. 1813, ch. 60) and the acts amendatory and supplementary and not expressly or constructively made subject to L. 1848, ch. 319, § 6, declaring a devise or bequest to a corporation formed under the latter act invalid unless the will carrying it has been made and executed at least two months before the death of the testatrix, may take a bequest under a will so made, as said section 6 of the act of 1848 was not intended by the Legislature as a supplement to such laws as specially provide for the incorporation of religious societies.

PROCEEDING upon probate of a will.

William H. Rand, Jr., George W. Delano and William L. Clark, for petitioners.

John M. Bowers, Charles P. Latting and Charles C. Burlingham, for contestants.

FITZGERALD, S. Helen C. Brush died of consumption in New York city on the 7th day of July, 1900, under fifty years of age. The nearest relatives whom she left her surviving were three sisters — Mrs. Findlay, Mrs. Southard and Miss Mary H. Brush — and a brother, James E. Brush. On the 24th day of May, 1900, she executed a will, under the terms of which Mrs. Southard, who is named as executrix, and who is the proponent herein, is given

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a legacy of $10,000, and the testatrix' other sisters and her brother are each given the sum of $1,000. After making various other pecuniary legacies, the decedent gives the remainder of her estate (which, approximately, is of the value of $20,000) to the First Church of Christ, Scientist, of New York city. The will is contested upon the ground of testamentary incapacity, and upon the further ground of undue influence alleged to have been exercised by agents of the residuary legatee.

The decedent was an unmarried woman. Her property came to her principally from the estate of her father and of that of her deceased brother, in which estates her sisters and surviving brother shared equally with her. She lived with her parents until they died, and, in the year 1889, took up her residence in a house on Forty-seventh street, in the city of New York, which she and Mrs. Findlay owned in common, and wherein she continued to live until within eighteen months of her death. The household, during the period of about ten years, consisted of the decedent and her sisters, Mrs. Findlay and Miss Mary H. Brush. The decedent had mental gifts and a culture of more than ordinary character. She was interested in literature and art, especially devoted to music, and had a strong sense of humor. She was tender-hearted and kindly in her intercourse with others, and, hence, had many friends, who had formed strong attachments for her. She was actively and loyally devoted to the tenets of her faith. It would seem that a tendency to consumption was hereditary in her family, her mother and brothers and sisters having died therefrom, and, in or about the year 1886, she herself was stricken with this disease. She placed herself under the care of a physician, who treated her for several years, but she believed that her condition continued critical. We find, from a letter written thereafter by her to an acquaintance, that it was at this time — about the year 1888 — that she became interested in the religious belief known as Christian Science. She tells this acquaintance that anything in the nature of a faith cure had always been regarded by her as "an ignorant superstition," but that, after hearing a "not particularly" able lecture upon this subject, she became impressed with what she terms "a plain statement of an honest experience;" that she then read some of the literature that pertained to this belief, "literature," she says, "without the least pretense of literary merit, but back of it all I saw a truth of vast

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significance." She thereupon attended lectures, read books upon the subject, and, in fact, became converted to the beliefs of Christian Science. Thereafter her condition improved, and, eventually, she, to all appearances, recovered her health, attributing her recovery to the powers of the belief which she had embraced to heal suffering and disease. From that time on she lost all faith in physicians, and never thereafter permitted them to treat her. Although the testatrix thus became a Christian Scientist twelve years before her death, and although her interest in this belief did not wane, yet she was not impelled to become an active church member until some seven years afterwards. In September, 1895, she applied for class instruction to a Mrs. Stetson, who was at the head of the First Church of Christ, Scientist, occupying the position known as first reader. It seems that she informed Mrs. Stetson that her sister, Mrs. Findlay, believed in mental science, so called, whereupon she was told that mental scientists were opposed to Christian Science, and that she should not, as yet, study the matter, as the opposing views that would result might prove unpleasant for her. Shortly afterwards, the decedent was taken seriously ill with pneumonia in both lungs. Her sisters became greatly alarmed, and, knowing how futile it would be to attempt to have a physician see her, they gladly carried out her wishes to be treated through the medium of Christian Science. After receiving the attendance of several healers of that faith, they obtained the services of Mrs. Stetson. In a short while, the decedent apparently recovered from her illness, and there can be no doubt that, as in her previous illness, she implicitly believed that she had fully recovered, and that her recovery had been effected entirely by Christian Science. From this time on, she became devotedly attached to this religious belief. During the period of her convalescence, she procured the services of a Miss Duncan, a Christian Scientist, to read books on this subject with her. She evidently found in Miss Duncan a congenial companion, whose enthusiasm and attachment for the belief they held in common were as great as her own, and so it came about that a very ardent friendship sprang up between these two women, as a result of which Miss Duncan lived with the decedent until the latter's death. In the early part of the year 1896, the testatrix joined the First Church of Christ, Scientist. She took class instruction, given to those who desired to perfect themselves in the teachings

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of Christian Science; she became a constant attendant at the services; she went to weekly meetings, where persons related how they had been cured of illness through this faith, and where she herself testified as to having been healed, as to her gratitude and affection for Christian Science, and as to the strength and happiness which she derived therefrom; and she both gave and loaned to this church substantial sums of money. In the month of December, 1898, she left her home on Forty-seventh street to pay a visit, and while away, and on the 16th day of January, 1889, she wrote a letter to her sisters, Mrs. Findlay and Miss Mary H. Brush, wherein she dwelt at length on the unhappiness of her home life, based chiefly on the hostile criticism which, she averred, was directed against her religious convictions, and wherein she expressed her determination to no longer reside with her sisters, saying that it was her belief that the relations of all of them would be happier apart, and that this proposed step seemed wise and right to her, and was not taken in any spirit but that of love. I shall have occasion, later on, to refer to the answer to this letter. This determination of the decedent was fully carried out, and from that time on she lived apart from these two sisters, with Miss Duncan as her almost constant companion. In the month of May, 1900, her health apparently began to fail, and it was then that she made the will here in contest, destroying a former will made some eleven years previously. She again relied on Christian Science to heal her, and Mrs. Stetson again treated her, but this time without effect. She was in the last stages of consumption, and within a few months she died, without having summoned medical aid at any time, a firm believer to the end in the wonderful powers which she attributed to the religion which she had embraced.

The above recital indicates sufficiently the main incidents in the life of the decedent which led up to the making of her will, and I shall now proceed to consider the issues raised by the parties herein. The circumstances surrounding the preparation and execution of the will have been testified to in much detail. It appears, from the testimony of Mrs. Stetson, that she called on the decedent on the morning of May 22, 1900, in pursuance of a request of the latter. The decedent requested her visitor to confer a favor on her, and then told her that she wished a will prepared, and, in answer to Mrs. Stetson's inquiries as to the neces-

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sity of such a thing, decedent said that she had had two hemorrhages, and thought it best to have a will made. She then transcribed the names of the persons whom she wished to be her beneficiaries from a memorandum book to a blank card, which she read aloud to Mrs. Stetson. One of the names on this card was that of her visitor, with the figures $5,000 placed opposite thereto. Mrs. Stetson refused absolutely to accept this legacy, and the testatrix was persuaded finally to omit her name. Mrs. Stetson was then requested to take this card to a Mr. Delano, an attorney, who was also a trustee of the Christian Science Church, and have him draft the will and attend to its execution. This she did immediately. Mr. Delano, who corroborates Mrs. Stetson's testimony as to the fact of his receiving his instructions from this card, at once drafted the will, and on the afternoon of the same day, that is, May 22, called on the decedent with a Mrs. Holden, a Christian Scientist. The will was read by the decedent, who expressed her satisfaction therewith, and it was thereupon duly executed, Mr. Delano and Mrs. Holden acting as subscribing witnesses. That night the decedent, in thinking over the transaction of executing her will, became very much worried as to whether she had omitted the name of her sister, Miss Mary H. Brush, as a legatee. On the next day she made inquiries, and she communicated with Mr. Delano. As a matter of fact, this name had been omitted, and Mr. Delano was directed to remedy this oversight. He prepared another paper identical with the first one, with the exception that Miss Mary H. Brush was given a legacy of $1,000, and this new paper was, on the 24th day of May, executed, with the same subscribing witnesses. On the day following, the decedent destroyed her old will made in the year 1889. Under its terms, as Mr. Delano testifies, it appears that Mrs. Southard was given $8,000, and the contesting sisters and brothers $2,500 each. Many other legacies were also made. It does not appear to whom the residuary estate was bequeathed. Both Mr. Delano and Mrs. Holden had known the decedent for some years, and, indeed, the latter was one of her friends. The testimony of Mrs. Holden, as to the *factum* of the will and the mental capacity of the testatrix at the time of its execution, was clear and convincing. The decedent, then, was not confined to her bed, but was up and about the room; she was bright and cheerful; she conversed intelligently with Mrs. Holden on general subjects; she certainly, so far as

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all appearances went, was perfectly rational and under no restraint whatever. She was undoubtedly cognizant of the amount and nature of the property which she had to dispose of, and the omission of her sister's name, which she caused to be supplied, would strongly show that she clearly had in mind all of those who had claims upon her bounty. It must also be added that she, at no time, showed any lack of prudence in managing her business affairs, and, in fact, ten days before she died, she engaged in a transaction in which her sister, Mrs. Findlay, was interested. Certainly, so far as concerns the *factum* of the will, an entirely clear and strong case was made out.

It is insisted, however, that the testatrix, at the time she executed her will, was laboring under various insane delusions, which were the sole or controlling cause that induced her action. One of these delusions is said to have been her belief that she was being persecuted by her sisters, Mrs. Findlay and Miss Brush, and another that she believed that certain marvelous things — such as the ability of a person to live after extracting all of his blood from his body — could be accomplished through the powers of the religion which she professed. Several experts were called, who testified that, in their opinion, these beliefs were insane delusions, and demonstrated a lack of testamentary capacity, and one of them went so far as to hold that the belief in Christian Science itself was an insane delusion. The record is replete with testimony upon this subject, and the workings and teachings of this religious belief have been gone into most minutely and elaborately. Its adherents believe that matter has no existence except as a maifestation of mind; that the divine mind is all-controlling; that the human mind, by becoming clean and purified, can, to a degree, realize and employ the powers of the divine mind; that all sickness and bodily ills are merely a species of sin, error or evil, and exist only in the apprehension of the human mind, and are in nowise phenomena of matter; that the divine mind has the same power to relieve one of such sin or error, manifested in the form of disease, as it has to expel any other unclean or evil thought, and that the human mind, if it can only so perfect itself as to partake in sufficient degree of the omnipotence of the divine mind, also will be able to throw off and rid itself of disease. These beliefs are embodied in a book called "Science and Health," which purports to derive them from the teachings of the Bible. Demon-

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strations of these teachings are attempted by Christian Scientists, who are known as "healers," and who treat disease without the use of any material means whatever, the treatment, as one of them testified, being "always a prayer." They do not claim to cure all bodily ills, but they attribute their failures not to the nature of the illness, but to the imperfect realization by the healer of the divine mind, since to them the possibilities of Christian Science are infinite. It is their belief, on the other hand, that, when a patient does recover, the healer has realized sufficiently the truths as taught by "Science and Health" and the Bible, and has, by his understanding of the power of God, as thus demonstrated by Christian Science, been able to remove the imperfections of which the disease was the result. It is, therefore, evident that, however opposed these teachings may be to the beliefs or notions of others, they are founded on the religious convictions of those professing them. This being so, the court cannot say that those persons are mentally unsound. The truth or falsity of a religious belief is beyond the scope of a judicial inquiry. Keeler v. Keeler, 20 N. Y. St. Repr. 439. Thus, the court has often been asked to pass upon the falsity of Spiritualism, and to hold that a follower of this faith, which, like Christian Science, is contrary to the convictions of most men, was of necessity laboring under an insane delusion; but it has uniformly refused so to declare or hold. Matter of Halbert, 15 Misc. Rep. 308; Robinson v. Adams, 62 Maine, 369, 404. There can be no doubt that the decedent's belief in the religion which she had adopted, and her strong adherence to the church wherein she worshipped, were the cause of the making of her will. Consequently, the only question which concerns us is as to the effect of this belief on her mind, the belief itself not being any evidence of insanity. Did it unseat her judgment, dethrone her reason, and thus deprive her of capacity to make a will? If it did; if, by reason of the effect of this belief on her mind, she became the victim of insane delusions, from which her will resulted, then it follows that the contestants must prevail. Taylor v. Trich, 165 Penn. St. 586, 606; Orchardson v. Cofield, 171 Ill. 14, 30; Matter of Beach, 23 App. Div. 411, 419. In this connection, it should be borne in mind that while, generally speaking, an insane delusion is a demonstrably false belief founded on supposed facts which really have no existence, but as to the falsity of which the person laboring under the belief

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will not and cannot be convinced; yet, as the Court of Appeals has said, "if there are facts, however insufficient they may in reality be, from which a prejudiced, or a narrow, or a bigoted mind might derive a particular idea, or belief, it cannot be said that the mind is diseased in that respect." And it matters not whether such idea or belief be utterly ridiculous or illogical, it is still not evidence of insanity. Matter of White, 121 N. Y. 406. There can be no doubt that the decedent used the word "persecution" in describing the conduct of her sisters towards her. Indeed, she told Mrs. Holden that it was because of the persecution of her sisters that she desired to change her former will. As has been shown, the testatrix became fervently devoted to Christian Science after her recovery from pneumonia. While she did not, by any means, give up her interest in current topics, in literature and in art, and while she retained her great liking for music, yet she devoted far less time to these matters than formerly, her chief interest in life now being to study the religion which she had embraced, and to associate with its followers. Mrs. Findlay testified that she found no fault with her sister because of this change, still it must be inferred, from the entire case that the decedent's sisters were greatly dissatisfied with her course. One of them had gone to the Christian Science Church for "amusement and entertainment;" they both believed that the claims made by this belief were preposterous, and there can be no doubt that they often spoke in terms of ridicule of the decedent's faith, both to her and to her friends. The testatrix was a keenly sensitive woman and her religious convictions were exceedingly strong and fervent. Such a person naturally would be wounded by unfriendly criticism of the mildest character directed against her. The decedent complained to several of her coreligionists because of the lack of sympathy that was shown by her family with regard to her religious belief. She seems to have been very much attached to her sisters, but she evidently felt that by reason of the conflicting views which she and they entertained respecting the religion which she professed she could not be happy or contented in their society or live in the same household with them. It has been pointed out that in January, 1899, the decedent finally wrote a letter to her sisters in which she went over this trouble and said that she would not return to them. Mrs. Findlay's reply to this letter is significant. She writes the decedent that the step thus

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taken by her is unloving and her criticism is unchristian; that there is no need of words or eloquence when the daily life shows coldness and lack of sympathy and interest, and that the past has shown how unwilling the decedent has been to look at these things fairly. The separation which ensued was by no means a severance of the other ties which existed between the testatrix and her sisters. They corresponded with each other in the most affectionate terms and sent one another gifts. Indeed, a genuine and deep-seated affection existed between them, the only cloud that darkened their lives being this difference as to religion. While, probably, the decedent entertained exaggerated notions as to the treatment accorded to her on this subject, yet, in the face of all of the facts disclosed, I fail to see how the conclusions she arrived at can in any sense be called an insane delusion or the result of one. There was certainly some continued opposition to her views, and, under the rule above enunciated, her belief that the conduct of her sisters amounted to persecution, while perhaps not justified, cannot be termed an evidence of insanity.

With regard to the other delusions which, it is claimed, affected the mind of the testatrix, it appears that on one occasion, in the winter of 1898, Dr. Ball, who had been her physician, requested her to answer certain hyphothetical questions which he desired to ask her in connection with Christian Science, telling her at the same time that he did not care to discuss the subject with her. He then asked her several questions, as, for example, what she would do if a foreign body were imbedded in her eyeball, and she replied that she would go to a Christian Scientist who would remove the pain, so that it would make no difference whether the foreign body were in her eye or not. He also asked her what she would do if she were bleeding to death by having her leg cut off, or what effect it would have if the blood were extracted from her body, and she said that she would not die if her mind were in harmony with the divine mind. The next day Dr. Ball received a letter from the decedent which he destroyed, and wherein, it seems, she explained at length her views upon Christian Science, but, unfortunately, he could not remember its contents. It will be at once observed that the decedent was merely expressing her beliefs as to certain supposititious cases, and that no argument was used to show to her that she was in error. She was held down to almost categorical answers, and although she afterwards gave her interrogator an

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explanation of her views, that explanation has been lost. It is fair to infer, from what has been testified to as to the teachings of Christian Science, that the decedent meant, that, since everything was possible in her faith, life could be preserved even in the miraculous manner supposed, providing that in any given case the healer could adequately realize the powers of, and place himself in sufficient harmony with, the divine mind. There is nothing to show that the views involved in her answers to the doctor were acted on, and if the belief in Christian Science itself is not an insane delusion, I fail to see how mere convictions of the efficiency of its powers in supposed cases can be termed evidences of insanity. Nor will the decedent's repeated declarations that she had been healed of disease by Christian Science be termed an insane delusion. It is urged that she added to these declarations that physicians had abandoned her case, but the evidence is not at all convincing that she made such statements. Even if she had, it can well be explained by ascribing them to a proneness not unusual with people of magnifying events and occurrences with which they have been associated, especially if there have been present some elements of novelty or of strangeness or of personal peril or danger. So far as concerns this belief in her cure, she certainly had been ill, she appealed to Christian Science and she believed she had recovered her health.

Upon a careful consideration of the voluminous testimony taken on this trial, I am of the opinion that the burden of proof on the issue of testamentary capacity, which is on the proponent, has been fully sustained, and that, at the time of the execution of her will, the decedent was of sound mind.

The contestants further insist that this will should not be probated for the reason that it was the result of undue influence exerted upon the testatrix by Mrs. Stetson and other Christian Science healers. In aid of this contention the rule is invoked that where a testator ignores the natural objects of his bounty and gives to strangers, the proponent should come into court prepared to show that the will represents the unconstrained wishes of the decedent, and should furnish some proof besides the *factum* of the will, particularly if a former will, made while the testator was in good health, has been supplanted. Garland's Will, 37 N. Y. Supp. 924; Matter of Way, 6 Misc. Rep. 484; Tyler v. Gardiner, 35 N. Y. 559. The rule is also invoked that where the beneficiary

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under such a will occupies a position of confidential relationship to the testator, a presumption of fraud arises. Marx v. McGlynn, 88 N. Y. 357, 371. Even if it be granted that this presumption exists in the present case, it is one of fact only, subject to being overcome by the evidence. In a case of the length of this one, involving the examination of nearly forty witnesses, circumstances are very apt to crop out here and there which, when deftly welded together, appear to spell out a suspicion of fraud, yet which, when regarded in the light of all of the facts, become of little or no moment. I have given careful consideration to the argument of contestants' counsel and have thoroughly examined the testimony upon which he relies; but I fail to find any substantial evidence tending to show undue influence. On the contrary, when all of the facts present are considered, the conclusion seems inevitable that no restraint whatever interfered with the expression of the decedent's testamentary intentions. So far as concerns Mrs. Stetson, it was shown that, excepting as the decedent met her in church as other members did, she saw very little of the testatrix socially during that time that she knew her, and, despite the earnest contentions of the contestants, I am convinced that she was entirely innocent of the fraud that has been sought to be fastened upon her. If undue influence existed, it must have been wrought through the medium of a conspiracy, in which various healers who attended the decedent, and particularly her friend, Miss Duncan, took part. The testimony of these witnesses absolutely negatives the existence of any such conspiracy. I was impressed with the truthfulness of their statements, and nothing that these women said or did in anywise indicates that any plan was formed or existed to coerce the volition of the decedent and to procure her to make a will.

The circumstances present in this case clearly show how it came about that the will in contest was made. The sisters and brother of the decedent were not dependent upon her bounty. Their property was equal to that inherited by the testatrix, and, so far as appears, they were as independently situated as she was. During the last four years of her life the church which she made her residuary legatee became deeply rooted in her affections. She felt that she owed to it a debt of gratitude, for she believed that it had given her new health and strength and happiness, and feeling in this wise, she doubtless thought that she could best aid it in

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the promulgation of its teachings by giving to it the bulk of her estate. She was, in my opinion, thoroughly aware of what she was about when she made this disposition, and she clearly knew the contents of her will, which was in absolute accord with her free and unconstrained intentions and wishes. Whether her determination not to give her fortune to her family was unwise, whether the residuary legatee herein has deserved the affection and gratitude which the testatrix has so bountifully given evidence of, are not questions for this court to consider in arriving at its decision. The decedent, being of sound mind and free from restraint, had the right to do with her own as she pleased, and her will must, therefore, be admitted to probate.

The contestants raise the question that the bequest to the First Church of Christ, Scientist, is void because made within two months of her death, contrary to the provisions of section 6 of chapter 319 of the Laws of 1848. It seems that the certificate of incorporation of this church recites that the incorporators are desirous of organizing a religious society pursuant to the provisions of "An act of the New York Legislature, passed April 5, 1813, entitled 'An act for the incorporation of religious societies,' and to the several acts of said Legislature amendatory thereof and supplemental thereto." The contention is made that the act of 1848 is supplemental to that of 1813, and, hence, that the residuary legatee is subject to the restrictions contained in the former. Section 6 referred to has been held to apply only to corporations organized under the law of which it forms a part, unless where, by express statutory enactment, it has been extended to others. Matter of Fitzsimmons, 29 Misc. Rep. 731; Hollis v. Drew Theological Seminary, 95 N. Y. 166. It has also been decided that certain of the corporations to which section 6 pertains are religious corporations, although not so described in terms in the statute, and that an act subjecting a corporation to the provisions of law relating to devises and bequests to religious societies makes applicable to the corporation the provisions of the section mentioned. Stephenson v. Short, 92 N. Y. 433. The corporation to which is bequeathed the legacy in question is not expressly or constructively made subject to section 6 of the act of 1848, or the provisions of law in respect to devises and bequests to religious societies. The fact that certain of the corporations to which the act mentioned relates have been held to be religious corporations furnishee no

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adequate reason for contending or inferring that the Legislature enacted section 6 as a supplement to the laws specially providing for the incorporation of religious societies, or intended its provisions to apply to such societies. As a result, the bequest in controversy, having been made to a corporation organized under the laws last referred to, is valid, and the legatee is entitled to take it. Submit findings and decree in accordance with this decision.

Decreed accordingly.

Matter of the Probate of a Paper Writing Propounded as the Last Will and Testament of ROBERT E. HOPKINS, Deceased.

(Surrogate's Court, Westchester County, August, 1901.)

Will — Presumption of revocation, from cancellation of signature, when rebutted — Testator's declarations as to his testacy inadmissible — Admission of evidence subject to motion to strike out — 2 R. S., m. p. 64, § 42.

In a proceeding to prove the will of a testator, it appeared that two days after his funeral three persons carefully searched every drawer of and every paper and envelope in a roll-top desk, in the office of a corporation, which the testator in common with other employees of the corporation used at times and which at other times was left open and found therein no will, and that three hours later one of these persons, who was also an employee, by accident found in a drawer of the same desk the will in an envelope endorsed with the testator's initials, with its signature cancelled by vertical marks made by a hand which an expert testified was not that of the testator. The will was in favor of the persons and corporations whom he would have been likely to benefit by his will.

Held, that the presumption of a revocation of the will, arising from the cancellation of the signature to it, was rebutted by the circumstances.

That the cancellation must be deemed to have been made by a stranger, and that as there was no proof of authority to him from the testator nor proof of revocation by two witnesses, the cancellation was ineffectual to revoke the will.

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Where a will is contested upon the ground that the testator has revoked it in this manner, his declarations, subsequent to its execution, tending to show that he believed himself to be testate down to the day of his death, are inadmissible.

In a Surrogate's Court, the admission of evidence, subject to a motion to strike it out and which subsequently is stricken out, is no more fatal to a defeated party than such a course would be upon an equity trial without a jury.

PROCEEDINGS upon the probate of a will.

Clarence S. Davison, Henry C. Henderson, James MacGregor Smith, G. R. Cook, Edgcomb & Rafferty, William C. Reddy, Alexander & Magill, for probate.

Joseph W. Middlebrook, special guardian of Robert E. Hopkins, Jr., contestant.

SILKMAN, S. The paper propounded was executed by the alleged testator, with all the formalities required by law, on November 14, 1891. It was filed for probate by Fanny W. Hopkins, his widow, and when so filed the signature at the end of the will was cancelled by fourteen vertical marks made with pen and ink through it.

Mr. Hopkins was a man of wealth, consisting largely of personal property. He left a widow, the petitioner, and one child, a son now about thirteen years old, his only heir-at-law.

Under the paper propounded the widow is the chief beneficiary. The special guardian appointed by the court, in pursuance of his duty, filed objections to the probate, alleging that the instrument was cancelled by Mr. Hopkins with intention to revoke the same, and that he died intestate.

During the trial of the proceeding quite a little testimony was offered as to the declarations of the testator subsequent to the execution of the paper propounded, tending to show that down to the day of his death he believed himself to be testate.

This evidence was strenuously objected to by the special guardian, upon the ground that it was incompetent; nevertheless, it was admitted, subject to a motion to strike out, and upon that motion the decision of the court was reserved, to all of which rulings the special guardian excepted.

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Ordinarily it is the duty of the court to rule finally at the time when objections and motions are made in respect of the admission of evidence, and the failure to so rule at the time would be error; nevertheless, there are exceptions to this practice in trials before the court without a jury, and particularly so in the Surrogate's Court, where pleadings do not exist, and the rules relating thereto do not obtain. It is frequently the case that not until the close of the evidence upon one side or the other can it be determined whether the evidence offered is competent or not. Take the case at bar; if the proponents had in mind to show that subsequent to the execution of the will the alleged testator became incompetent to perform a testamentary act, his declarations and conduct could have been offered as competent evidence upon that issue. In the absence of pleadings it could not be anticipated what might be in the mind of counsel, or the ultimate object of the testimony; and so it follows that the reservation by the court of its ruling was correct, unless the contestant's case was prejudiced thereby, in that he was precluded from presenting evidence tending to explain or contradict the testimony objected to, or prevented from cross-examining witnesses in respect thereto.

As I have concluded to sustain the special guardian's objections and strike out all the testimony showing, or tending to show declarations by the alleged testator, no possible prejudice can result to the case of the special guardian by reason of the court's reservation of its decision.

The proponents have not shown, nor have they attempted to show, that Mr. Hopkins was at any time incompetent to make or revoke a will, and as the law has been recently settled in this State and in the United States courts to the effect that such declarations are incompetent upon the issue whether testator intended to revoke the paper propounded, evidence thereof cannot be considered. Matter of Kennedy, 167 N. Y. 163; Throckmorton v. Holt, 21 Sup. Ct. Rep. (U. S.) 474.

The testimony of Mr. Warren, at pages 18, 19 and 20 (S. M.); that part of the answer of Dr. Coutant, at page 37 (S. M.), "He told me that he had made his will some time before and saw no special reason for changing it;" the testimony of Alexander Chambers, at pages 56, 57 and 62 (S. M.); and the testimony of Townsend B. Roe, pages 112, 113, 114 and 115 (S. M.), is stricken out, and exceptions given to proponents.

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In determining whether Mr. Hopkins made the marks through his signature, and, if he did, was it with an intention to revoke his will, we must keep constantly in mind the sanctity of the instrument and the safeguards that the law has thrown around the act of execution and the act of revocation.

The Revised Statutes provide (2 R. S. 64, § 42), "No will in writing except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses."

It will be noticed that the statute contemplates a cancellation, either by the hand of the testator, or by the hand of another; and where, by the hand of another, by testator's direction and consent. Moreover, such cancellation and the direction to cancel must be proved by at least two witnesses. The statute does not provide for any presumptions, but leaves the circumstances to be proven.

The special guardian argues, and with much ability, that where a will is found with the signature erased, there arises a presumption that it was done by the testator, and that to overcome such presumption there must be evidence that it was done by some other hand, and cites Matter of Philp, 46 N. Y. St. Repr. 356; Matter of Clark, 1 Tucker, 445, as authorities directly in point, and cites as analogous Hard v. Ashley, 88 Hun, 103; Collyer v. Collyer, 110 N. Y. 481, where the question was that of an alleged lost will.

No one questions but that these cases were correctly decided upon their own peculiar facts, and it is the facts of each case which control.

The statute was enacted to prevent fraud and not to invite it, therefore such a broad presumption which would make the accomplishment of a fraudulent cancellation the easier would contravene the spirit of the act.

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But if we observe the distinction between a legal presumption and a legal inference, which terms are sometimes inadvertently used as synonymous, we can thoroughly harmonize the spirit of the statute and the authorities.

A presumed fact is one taken for granted and accepted, as a result of human experience and general knowledge, while an inference is the conclusion drawn from the proof or admission of circumstances which by reason of the same human experience and knowledge would naturally lead to it.

A man is presumed to regard his will as a private and sacred document, and on that account is presumed to keep it with the same degree of care and privacy as he does his most important papers and documents; and when it is shown by competent evidence that his will has been found in a place where he is in the habit of keeping papers and documents of importance and value, with the signature erased, or no will is found in such a place, as the case may be, there is a legal inference arising from such evidence, together with the presumptions mentioned, that in the one case he cancelled the document himself, and in the other that the destruction was by his own hand.

In the Clark case the proof showed that the will was found in a drawer of testatrix' bureau in her bedroom by proponent, a legatee, with two lines drawn in ink across testatrix' signature, and with a line through proponent's name as legatee in the body of the will. No person was shown to have been in the room where it was found, except the decedent, the legatee and her uncle, who were her witnesses. The surrogate said, "Under these circumstances I must hold that the *evidence* which has been adduced by the proponent herself, raises the presumption of cancellation and revocation by the decedent."

In the Philp case it was proved that the will was found by the testator's wife, in his safe, which was locked, and the combination in her possession. Mr. Justice O'Brien, at General Term, said, "When the will was presented, it was with this infirmity of cancellation upon and a part of it. In the absence, therefore, of any evidence, whatever, from which the inference or presumption could be drawn of improper treatment of the will, the learned surrogate was justified in the conclusions which he drew from the *conceded facts.*"

In Matter of Brookman, 11 Misc. Rep. 675; 67 N. Y. St. Repr.

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397, the will was shown to have been found in testator's box in his safe among a lot of cancelled and worthless papers marked "void."

In Collyer v. Collyer, which was the case of a lost will, the proof showed that a most diligent search had been made for the will, that none was found, and that none had been seen by any one for six years prior to the testator's death.

In the case of Hard v. Ashley, also a case of a lost will, the fact was shown that the last seen of the will was with the deceased, or under her control.

In all these cases there was evidence or admissions that the will in its mutilated condition was in the personal keeping of the testator, or that after a search in the places where the testator would naturally keep a will none was found.

I find no authority going to the extent of holding that where a will floats into the surrogate's office from an unknown source, or is found in the possession of strangers with the signature cancelled, or obliterated, without other evidence, that there is any presumption that the destruction or cancellation was by the hand of the testator. There must be some evidence, either direct or circumstantial, upon which the court can base a finding of fact one way or the other. Hitchings v. Wood, 2 Moore P. C. 355, 447.

In this case, Lord Lyndhurst writing the opinion, says, "Then, as to the alleged cancellation, we think, if this be a genuine instrument, that the *onus* to make out the fact of the cancellation is on those who oppose the codicil. It seems that a corner had been burnt, the paper torn through, and in one place across the signature; but by whom, and under what circumstances, does not appear. There is nothing whatever to show that it was done by the testator, or if so, with what intention it was done. If it be a genuine instrument it proves that there was also another codicil, and which is not forthcoming. It is obvious, we think, that it must have been improperly dealt with, for if it was defaced by the testator he would have either have entirely destroyed it or it would have been found in this state among his papers. The circumstances of its being in other hands shows that a fraud had been practiced, and that no safe conclusion can be drawn from its appearance that it was burnt or torn by the testator. But even if it had been found among the testator's papers at the time of his

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death, we incline to think some further evidence beyond its present appearance would be necessary to show that he intended to cancel it. Our opinion, therefore, is that the codicil ought to be approved."

This language of Lord Lyndhurst is quoted by Mr. Justice Peckham in Throckmorton v. Holt, in which latter case the paper purporting to be the will of Judge Holt came to the Probate Court through the mail, from an unknown source, partly burned and torn, but not to the extent of making it illegible. Mr. Justice Peckham, in his opinion reversing the lower court, says: "There must be some evidence of an act by deceased, or under his direction, which would be sufficient to show the fact, or the instrument must have been found among the private papers of the deceased, mutilated and torn, or otherwise defaced, and under such circumstances that the fact of revocation might be presumed."

The proof in this case shows that Mr. Hopkins was a careful, methodical, business man. At the time of his death he was the secretary and general manager of the Tide Water Pipe Co., the office of which was at 12 Broadway, New York city, at which office he attended about twice a week. When there he occupied a roll-top desk of the company assigned to his use, but when he was absent the desk was occupied and used by others, being left unlocked so that anyone in the office could have access to it.

He had a safe deposit box in the Produce Exchange Safe Deposit Company, of New York city, in the joint names of himself and wife, and he also had a safe deposit box at Tarrytown.

He died on the ninth of May, and was buried on the twelfth. On Monday, the thirteenth, his widow, the proponent, accompanied by her brother, Alexander Chambers, went to New York to the office of the Tide Water Pipe Co., and there met Mr. Warren, who was connected with the company, and who had held confidential relations with the deceased and had occupied a desk in the same room with him.

These three then went across the street to the Produce Exchange Safe Deposit Company's vaults and made a careful search for a will, but none was found. They then returned to the office of the Tide Water Pipe Co. and a search was made by Mr. Warren and Mr. Chambers through the company's safes, in which Mr. Hopkins sometimes put papers for safekeeping, and through the desk in the office which had been used by him in his lifetime. No will was found.

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Mrs. Hopkins and her brother returned to Tarrytown that day and searched the safe deposit box at that place, but no will was found.

On the next day, Tuesday, they returned to the office of the Tide Water Pipe Co. and the same persons again examined the box in the Produce Exchange Safe Deposit Company's vaults with like result. They then returned to the Tide Water Pipe Co.'s office and searched again carefully through the desk, which was an ordinary roll-top desk with drawers on the right and left hand sides of the top portion, these drawers being about fifteen inches long, eight inches wide and two inches deep. Every drawer was examined and every paper taken out and examined, and every envelope was opened, but no will was found, and the search was given up about 1 o'clock. Mrs. Hopkins returned again to Tarrytown and made another search in the box at the bank and in his private desk at home, with no better results.

About three hours after Mrs. Hopkins and Mr. Chambers left the New York office, Mr. Warren went to the same desk to get a check book which belonged to a corporation in which both Mr. Hopkins and himself were interested. He opened the right-hand drawer under the roll top and there found a blue envelope, on the outside of which were the words "Robert E. H." in Major Hopkins' handwriting. Inside the envelope was the will. There were no other papers of any kind in this drawer, and the drawer was otherwise empty, with the exception of a few pens and an ink eraser.

On examining the will, Mr. Warren found the signature of Major Hopkins to the will cancelled as already described. He read the will and called the attention of some of the parties in the office to the fact, and on the following morning turned it over to Mrs. Hopkins in the condition in which it was found.

It appears that Mr. Hopkins was a man of about sixty-eight years of age at the time of his death. At the time of the making of the will he was suffering from some tremulousness in his hands, clearly evident in his handwriting, and which increased as he grew older.

We have the evidence of Mr. Carvalho, the noted handwriting expert, that in his opinion the marks cancelling the signature were not made by the same hand that wrote the signature.

It further appears that a year prior to his death he had been

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told by his physician that he had heart trouble and must be very careful; that he was liable to pass away at any time by apoplexy, and that he should get his business in proper shape, and that if he had not made a will he should do so.

Then we have the document itself, which apparently fulfills the testator's life sentiments. He remembers the institutions of his early education, the church which he first attended, the cemetery in which his father and mother were buried, the church at the place where his early struggles took place resulting in his fortune, the missions in which he was interested, and the friends and relatives who had attached themselves to him during life, and above all, providing for his aged sister, who was dependent upon him and for whom he had provided for many years.

The evidence is that there had been no change in his feelings toward any of the objects of his bounty, but that the ties grew stronger as the years rolled on. The relationship which existed between this man and his wife were of the closest and most confidential character.

Under all these circumstances, and under all the proofs which are before us, can we infer that he cancelled his signature to the paper offered for probate with an intention to revoke the same? I think not. I think that the inference is overwhelming that the cancellation was not made by the testator himself, but by another hand. There is, however, no proof that it was made by another by his direction and consent, as the statute requires. Therefore, the paper must be regarded as a valid testamentary disposition and be admitted to probate.

Costs will be allowed to all parties, payable out of the fund, with an allowance to the special guardian to be paid out of the infant's share of the estate.

The special guardian has represented his ward with conspicuous zeal and fidelity, and his conscience might well be satisfied of a duty well performed with the entry of the decree of the Surrogate's Court. Nevertheless, the interest of the infant at stake is so large, and the facts so unusual, that I think his duty will not be complete until the law, as applied to the facts of this case, has been reviewed at least by the Appellate Division of the Supreme Court.

Probate decreed.

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Misc.] Court of General Sessions, New York County, August, 1901.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. JOHN D. HERLIHY, Defendant.

(Court of General Sessions of the Peace in and for the County of New York, August, 1901.)

Indictment of police officer for an omission of duty, in having failed to suppress houses of ill fame — Offense at common law — Sufficiency of indictment — Effect of Penal Code, § 154 — Charging a single crime — Statement of the criminal act.

Every willful disobedience of a law enjoining the performance of official duties and every willful neglect of such duties is a crime at common law and neither corruption nor injurious result need be proved as an essential thereof.

An indictment, which charges a police captain of the city of New York with willfully omitting to perform the duty enjoined upon him by law, of observing and inspecting houses of ill fame and repressing all unlawful or disorderly practices therein, in that for about fourteen months there were continuously and openly kept and maintained in his precinct 109 such houses, described by street and number, where unlawful and disorderly practices were committed and where common prostitutes and disorderly persons resorted and resided, and which also charges that he continuously and willfully neglected his duty to repress them or the practices of their inmates, states facts which constitute the statutory crime of an omission of official duty.

The provision of the Penal Code, § 154, making every willful omission of duty by a public officer, "where no special provision has been made for the punishment of such delinquency", a misdemeanor, affords no ground for the defendant's contention that he is thereby made responsible only for a violation of the rules of the police department covering a neglect of duty and only to that department, as any neglect or omission of official duty is a crime against the People, punishable by them, and moreover the "special provision" means one of law and none applicable to a willful omission or neglect of duty exists except those contained in the Penal Code, §§ 117 and 154.

The indictment, in so far as it charges the defendant with willfully omitting to suppress 109 houses of ill fame, does not charge 109

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crimes but charges one neglect of duty predicated on many acts of omission.

The allegations of the indictment, "that there were certain houses of ill fame in which unlawful and disorderly conduct and practices were committed, and divers common prostitutes and disorderly persons resorted to and resided therein and solicited men", while sufficient as alleging the existence of the houses, are insufficient as to the defendant since he is entitled to know what he has to meet on the trial, and therefore there should be such particularity in regard to each house, by a distinct allegation of time, place and description, as would, under the general issue, warrant the introduction of testimony as to its character and the acts committed therein and enable the court to pass judgment, as matter of law, upon any one allegation as if it were the only one pleaded.

Semble, that the names of the keepers of the houses should be set forth if known, and if unknown, that that fact should be stated.

DEMURRER to indictment charging defendant with neglect of duty.

Abraham I. Elkus and Carlisle J. Gleason, for demurrer.

Eugene A. Philbin, District Attorney, opposed.

GOFF, R. The indictment accuses the defendant of the crime of "willfully omitting to perform a duty enjoined upon him by law." In substance it states the act constituting the crime to be that the defendant was a captain of police in command of the Twelfth Precinct of the city of New York; that he was charged by law with the duty of observing and inspecting houses of ill fame, repressing all unlawful and disorderly conduct and practices therein, enforcing the law and preventing violations thereof; that from the 22nd day of September, 1899, to the 18th day of November, 1900, there were continuously, openly and notoriously kept and maintained in the precinct, while he was in command, one hundred and nine houses of ill fame, described by street and number, where unlawful and disorderly practices were committed,

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and where common prostitutes and disorderly persons resorted and resided, and that he continuously and willfully neglected to perform the duty enjoined upon him by law, to use and exercise all proper and effective means to repress and prevent the keeping and maintenance of those houses, but on the contrary permitted them to exist and continue without any interference or endeavor on his part to enforce the law.

To this indictment the defendant interposes a demurrer on the grounds:

First. That the facts stated do not constitute a crime.

Second. That more than one crime is charged in the indictment, and

Third. That it does not contain a plain and concise statement of the act constituting the crime. Code Crim. Pro., § 323.

These grounds will be considered in their order:

First. That the facts stated do not constitute a crime.

By his demurrer the defendant admits all the facts that are well pleaded. What are the facts alleged? (1) That he was captain of police; (2) that the law enjoined upon him the duty of carefully inspecting all houses of ill-fame and houses where common prostitutes resort or reside, to repress and restrain all unlawful or disorderly practices therein, and to enforce and prevent all violations of law; (3) that during a certain period of time and while he was in command of the twelfth precinct there were 109 houses of ill-fame therein kept and maintained openly and notoriously, and (4) that he willfully neglected his duty by permitting such violations of law to continue, and by omitting to take proper and effective means for their repression and prevention.

All of these facts are susceptible of proof, either by legal presumption or testimony of witnesses. Can it be seriously contended that a captain of police is not a public officer, or that he is not in duty bound to enforce the law, or that the maintenance of a house of ill-fame is not a violation of law, or that if houses of ill-fame are notoriously maintained in his precinct it is not his duty to suppress them, or that if he willfully neglects to suppress them he is not guilty of a neglect of duty, or that for such neglect of duty he is not amenable to the law? If these propositions can be successfully maintained there is an end to the prosecution, and, indeed, there is an end to all responsibility of the policeman as a public officer. But such is not the law, for of necessity to the very

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existence of organized society a public officer is bound to a strict performance of and responsibility for the duties which devolve upon him. It is a rule of general application that every willful disobedience of law enjoining the performance of official duties and every willful neglect of such duties is a crime, and neither corruption nor injurious result need be proved as an essential of the crime. Both the common law and the statute declare this rule to be the law.

In Crouther's case, 1 Cro. Eliz. 654, it was held that an indictment would lie against a constable by reason of his failure "to raise hue and cry" at night immediately upon receiving notice of a burglary just committed. So it was held during the reign of Queen Anne that "if a man be made an officer by act of Parliament and misbehave in his office he is indictable for it at common law, and any public officer is indictable for misbehavior in his office." Anon., 6 Mod. R. 96.

"Every culpable neglect of duty enjoined on a public officer, either by common law or by statute, is a crime." 1 Russ. Cr. (6th ed.) 419; Roscoe Cr. Ev. 752; 1 Bish. Cr. Law, § 913; 2 McClain Cr. Law, § 909.

"A man who undertakes a public office is bound to know the law, and to possess himself diligently of all the facts necessary to enable him in a given case to act prudently and rightly. If he do not, and through mistake of law or of fact be guilty of negligence, he commits a penal offense. This seems hard law, but it is essential for the safety of the State." Whart. Cr. Law, § 1582.

Some instances where public officers have been held criminally liable for failure to perform or neglect a duty will serve to illustrate the principle enunciated in the text. For failure of commissioners of excise to pass upon a complaint for the revocation of a license (People v. Meakim, 133 N. Y. 214); for willful disregard of duty in granting or refusing licenses (People v. Norton, 7 Barb. 477); for failure of an overseer of the poor to make proper provision for paupers in his charge (State v. West, 14 Lea, 40, and see, also, Cowley v. People, 83 N. Y. 464); for a failure of a mayor to notify a county attorney of the existence of certain liquor saloons of which he had cognizance (State v. Gluck, 49 Kans. 533); for the neglect of a sheriff in permitting a jail to become so filthy as to endanger the health and the lives of the

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prisoners (McBride v. Commonwealth, 4 Bush [Ky.], 331); for failure of a magistrate to take proper measures for the suppression of a riot (Reg. v. Neale, 9 Car. & P. 431; Res. Pub. v. Montgomery, 1 Yeates [Penn.], 419); for neglect of a constable to detain a street-walker placed in his custody during the night (Rex v. Bootie, 2 Bur. 864), and for not arresting a prisoner on a magistrate's warrant (Reg. v. Johnson, 11 Mod. 62); for failure of a town marshal to prosecute a crime committed in his presence (Shaw v. City of Macon, 21 Ga. 280); for failure of a game warden to arrest when he had knowledge of a violation of law (State v. Darling, 89 Maine, 400); for failure of a chief of police to interfere with a mob (Hopewell v. State, 1899, 22 Ind. App. 489); for the neglect of a governor of the East India Company to take proper measures for the mobilization of troops and the furnishing of supplies (King v. Hollond, 5 T. R., D. & E., 607).

A case in the Appellate Division of the Supreme Court contains a very forcible and significant judicial expression of the law as to the duty of a captain of police. Captain Eakins was dismissed from the force by the commissioners on a charge of neglect of duty in failing to suppress houses of ill-fame in his precinct. On review by certiorari the court said; "The first step on the part of the prosecution was to prove the existence of a number of houses of prostitution and assignation within the fifteenth precinct * * * And it must be assumed in the further consideration of this case that the commissioners found that the houses were disorderly. This fact being found, it was still necessary, in order to charge the relator with neglect of duty, that it should appear either that he had knowledge of the existence of crime in his precinct and failed to make reasonable effort to prevent it, or that, if he did not have such knowledge, with reasonable diligence he could have obtained evidence of criminal conduct, and failed to do so." People ex rel. Eakins v. Roosevelt, 16 App. Div. 364.

In Weiss v. Herlihy, 23 App. Div. 608, the court say: "It is the duty * * * of a captain of police, to prevent all violations of law in his precinct, and restrain them so far as possible, and, if he is unable to prevent such violations of law, to arrest the offenders and if possible, bring them to punishment * * * . It is made his duty not only to arrest offenders, but for the purpose of preventing the crime, to observe carefully and inspect this place at all times of the day and night. * * * So long as the duty

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of preventing crime is imposed upon the captain of police, he certainly must be vested with a broad discretion as to the strictness of the inspection. It is his duty to make it so strict that the violations of law cannot take place."

By section 322 of the Penal Code the keeping of a house of ill-fame is declared to be a misdemeanor. Section 315 of the Greater New York charter says: "It is hereby made the duty of the police department and force, at all times of the day and night, and the members of such force are hereby thereunto empowered to * * * carefully observe and inspect all * * * houses of ill-fame or prostitution, and houses where common prostitutes resort or reside; * * * and to repress and restrain all unlawful and disorderly conduct or practices therein; enforce and prevent the violation of all laws * * * and to arrest all persons guilty of violating any law * * * for the suppression or punishment of crimes."

Section 117 of the Penal Code declares that "A public officer, or person holding a public trust or employment, upon whom any duty is enjoined by law, who willfully *neglects* to perform the duty, is guilty of a misdemeanor." Section 154 declares that "Where any duty is or shall be enjoined by law upon any public officer, or upon any person holding a public trust or employment, every willful *omission* to perform such duty * * * is punishable as a misdemeanor." The two sections are similar in language except that in one (117) the phrase "willfully *neglects* to perform the duty" is used, while the other (154) reads "willful *omission* to perform such duty." These expressions are reciprocally equivalent and expressive of the legislative intent.

In construing the Code or an indictment thereunder the term "neglect" imports a want to such attention or the probable consequence of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. Code Crim. Pro., § 713.

It is urged that a willful neglect of duty is a delinquency, that for such delinquency the defendant is responsible only for a violation of the rules of the police department, and that he is relieved from criminal liability by the exception contained in section 154, which reads: "Where no special provision shall have been made for the punishment of such delinquency." The words "special provision," as used here, mean special provision of law, and there are no other special provisions of law declaring a willful neglect

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of duty a crime and prescribing for its punishment than are contained in sections 117 and 154.

Section 250 of the Greater New York charter confers upon the police board the power to prescribe rules and regulations for the government and discipline of the police force. Section 272 vests in the board a discretion that on a conviction of a member of the force of any legal offense or neglect of duty or violation of rules or conduct unbecoming an officer, he may be punished by fine or dismissal.

The specification of "neglect of duty" in this section is not a special provision of law providing for its punishment as a crime. A neglect of duty may be an absence from post or roll-call or failure to properly patrol. Each of these acts of omission may be a delinquency, but it is not a crime. If a policeman commits a burglary on his post, is he to be protected from the consequences of his crime because he is liable to punishment by the department for conduct unbecoming an officer? Neglect of official duty may be a violation of the rules of the department, but it is also a crime against the people, and it cannot be prosecuted or punished as such by the police department, but only by the people.

In King v. Bembridge, 3 Doug. 327, it was contended, in a criminal action against an accountant in the public service for failure to disclose misappropriations, that the negligence complained of constituted at most a civil wrong. Lord Mansfield, in his opinion, says: "The law does not consist of particular cases, but of general principles which are illustrated and explained by these cases. Here there are two principles applicable, first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehavior in his office. * * * Second. Where there is a breach of trust, fraud or imposition in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country."

In State v. West, *supra,* a commissioner of the poor was indicted for failure to provide for certain paupers. It was urged that section 1958 of the Code provided the only punishment for the offense, which was removal from office, and it was held that the power of removal was but an incident of the power of appointment.

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Neither law nor reason exists which excepts a police officer from the responsibility which attaches to every person in the public service. Knowledge of the duties of the office and diligence in their performance are conditions imposed when the office and its emoluments are accepted. A captain of police is clothed with ample powers and discretion for the detection and suppression of crime and the arrest of offenders in his precinct. He is required to give the same degree of attention and diligence to the performance of his duties as an ordinarily prudent man bestows on his own concerns, and if he willfully omits or neglects to do that which by law he ought to have done, he commits a crime.

Second. That more than one crime is charged in the indictment.

Sections 278 and 279 of the Criminal Code, read together, prescribe that "The indictment must charge but one crime and in one form" except that it may be charged in separate counts to have been committed in a different manner or by different means — and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts." The essential of these two sections is that the *indictment must charge but one crime.* The exceptive and permissive clauses are not pertinent to the point under consideration.

In substance, it is claimed by the demurrer that the indictment charges the defendant with willfully omitting to suppress 109 houses of ill-fame in his precinct; that willfully omitting to suppress one house is a crime; that willfully omitting to suppress 109 houses constitutes 109 crimes, and that, therefore, 109 crimes are charged.

At first blush there appears to be much force in this contention, and it is urged with a great deal of acumen and plausibility. It must be conceded that the willful neglect to suppress any one house of ill-fame is a crime, but for the purposes of pleading it does not follow that the willful neglect to suppress 109 houses makes 109 crimes. The difficulty is that the mind is distracted from the true test by the multiplicity of the acts alleged.

The gravamen of the crime charged is *neglect of official duty.* While it is true that one act of omission or commission may constitute neglect, it is also true that neglect may consist of a series of acts of omission in failing to perform a duty, or in not doing things which one ought to and has the power to do. A single act

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of omission may indicate carelessness, but a series of acts may indicate design. Failure to suppress one house of ill-fame is a neglect of duty, and yet that act consists of several subordinate but constituent acts, such as failure to obtain evidence, to apply for a warrant, to make arrest, to warn the public, etc. These are all evidentiary acts of the main act charged. So, where the charge of neglect of duty is predicated on several acts of omission, these acts are but evidence of the neglect, and it makes no difference if the acts are in themselves criminal, because punishment is inflicted not for the acts, but for the neglect. The law says neglect of duty is a misdemeanor, and no matter how many separate and independent acts which may of themselves be misdemeanors that may be given in evidence to prove the charge, only one crime can be proven, and that the one charged. Assume that the indictment charged the crime to consist in failure to suppress one house of ill-fame, it would not be open to the criticism of charging more than one crime, and if the theory of the defense be carried to a logical conclusion it would. If the indictment alleged that the house of ill-fame existed for 100 days, and that the defendant failed to suppress it during that time, every day of the existence of that house was a violation of law, and every day of its existence that he failed to suppress it he was guilty of neglect of duty; consequently he was guilty 100 times. But that is not the true theory, nor is it the law.

Where an offense is of a continuing character, such as bawdy-house, common gaming-house, nuisance, etc., it may be pleaded in *a continuando,* and only one crime is charged. The statute says: "Where any *duty* is enjoined by law, every willful omission to perform such *duty,*" etc., and by the charter (*supra*) it is made the *duty* of the police to inspect all *houses* of ill-fame. Manifestly the duty is not performed unless all houses are inspected, and if *they* be not inspected there is an omission to perform *a duty.* The singular number includes the plural, and the plural the singular. Penal Code, § 718, subd. 16.

The indictment charges precisely what the law declares, that the defendant omitted to perform a duty enjoined upon him by law in failing to inspect *houses* of ill-fame in his precinct, numbering 109. These houses are specified by street and number, as evidentiary acts to prove that he did omit to perform a duty.

A conspiracy to commit a number of crimes and the commission

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of overt acts appropriate to each of them may be included in one count of the indictment. Bish. Cr. Pl. & Pr., § 437, subd. 2; State v. Kennedy, 63 Iowa, 200; People v. Wright, 9 Wend. 193.

In Kane v. People, 8 Wend. 203, defendant was indicted for neglect of duty as director of a turnpike company. The indictment contained two counts, alleging different acts of neglect, and it was held good on affirmation of judgment. "If one offense alone is charged, it is not sufficient to render an indictment double that another offense is stated in setting out the manner in which it was committed, or the different means employed." People v. Casey, 72 N. Y. 393.

Several acts, each in itself criminal, may be charged in one count, if they are of the same nature, and so connected as to constitute one criminal transaction. Reg. v. Bowen, 1 Cox C. C. 88; Commonwealth v. Eaton, 15 Pick. 273.

People v. Flaherty, 162 N. Y. 538, is not an authority against this rule. There the act charged was statutory rape. Evidence of several acts of intercourse was given, and the court said this was proper to show the disposition of the parties and as a circumstance of corroboration; but it was not proper to charge in the indictment any but one act. The reason of this is plain, and that the act in itself constituted the crime, and, therefore, only one act could be charged. The case in principle is not parallel.

"No matters, however multifarious, will constitute duplicity in an indictment or information, provided that all such matters taken together constitute but one connected charge." People v. Harris, 7 N. Y. Supp. 773. In this case (General Term), it was held that an indictment which charged the defendant with delivering watered milk on two successive days at a cheese factory charged but one crime. A count charging an endeavor to commit two crimes is good because the crime charged is the endeavor. Arch. Pl. & Pr. (Lond. Ed.) 54.

An indictment for a willful breach of duty against an officer of the East India Company for failure to take proper military measures and furnish supplies for the support of the company's ally was held sufficient by Lord Kenyon, who said that, as the facts upon which the duty was founded all arose while the defendant was one of the council, he was bound to take notice of them. King v. Hollond, *supra*.

A count in an indictment for robbery may charge assault and

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larceny, and for larceny the stealing of several articles, and for libel that it was published and caused to be published, and for forgery that the writing was forged and caused to be forged. Any one of these several acts is a crime, but the including of them as descriptive of the crimes charged does not make the indictment double, for there is but one crime charged in each case.

An indictment for arson contained five counts, each of which charged the firing of a house of a different owner, and that one fire burned them all, and it was held that but one crime was charged. Reg. v. Trueman, 8 C. & P. 727.

In Woodford v. People, 62 N. Y. 117, where an indictment charged the defendant with setting fire to thirty-five dwelling-houses owned by different persons, it was objected that it was bad, for duplicity in charging more than one offense. Church, Ch. J., said: "It charges the burning of a number of houses by a single act, at one time and place. * * * A conviction or acquittal upon such an indictment would be a bar to an indictment for burning any other house burned by the same act. There was but one crime committed in respect to all the dwelling-houses."

In Bork v. People, 91 N. Y. 5, Andrews, Ch. J., said: "Where an offense may be committed by doing any one of several things, the indictment may, in a single count, group them together, and charge the defendant to have committed them all, and a conviction may be had on proof of the commission of any one of the things, without proof of the commission of the others." People v. Davis, 56 N. Y. 795.

While I have been unable to find the case of an indictment charging neglect of duty in the precise form adopted here, yet in principle and from analogy of adjudication cases I am led to the conclusion that, either at common law or under our system of pleading, the indictment charges but one crime; that but one judgment can be pronounced and one punishment inflicted, and that the defendant can plead the indictment in bar to any subsequent prosecution for any of the acts alleged therein.

Third. That it does not contain a plain and concise statement of the act constituting the crime.

The language of section 275 of the Criminal Code, upon which this ground of demurrer rests, is, "The indictment must contain a plain and concise statement of the act constituting the crime, with-

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out unnecessary repetition." A prime requirement of this rule of pleading is that there must be a statement of the act, governed by two qualities — plainness and conciseness. To be plain it must be definite and obvious to the understanding; to be concise it must be comprehensively expressed. It would be very difficult to formulate a rule as to what is unnecessary repetition, as each indictment would have to be measured by its own peculiarities as well as by the vocabulary and rhetorical taste of the pleader.

Pleading "a house of ill-fame" is not pleading a legal conclusion. The phrase has a sufficiently legally defined meaning. Betts v. State, 93 Ind. 375.

The gist of the offense of keeping it is that it is kept for lewd purposes. It is not necessary to plead the particular acts of lewdness. 2 Hawk C. 25, § 575; United States v. Royall, 3 Cranch, 618. It is sufficient to make a general allegation under the statute. Commonwealth v. Ashley, 2 Gray, 356. If the statute (Penal Code, § 322) merely said a person who keeps a house of ill-fame is guilty of a misdemeanor, it would be a sufficient definition and description of the crime. The fact of keeping a house of ill-fame legally imports the crime committed, and where the act itself imports the wrong it is sufficient to charge it in general terms. It is sufficient to charge that a person is a nightwalker, because that term has a fixed meaning in the law. State v. Dowers, 45 N. H. 543. It is a statutory offense, for, though it was an offense at common law, its prohibition by the statute makes it one of statutory creation. Mason v. State, 42 Ala. 545. A general form of averment under this statute has been held sufficient. People v. Hulett, 39 N. Y. St. Repr. 646.

The indictment alleges "that there were certain houses of ill-fame in which unlawful and disorderly conduct and practices were committed, and divers common prostitutes and disorderly persons resorted to and resided therein and solicited men," etc. While each of these acts may be an offense, yet they all flow from and are included in the generic term "house of ill-fame" and are properly included. An indictment charging the keeping of a house of ill-fame, resorted to by persons for the purpose of prostitution or lewdness, only charges one offense, that of keeping a house of ill-fame. State v. Toombs, 79 Iowa, 741; People v. Hulett, *supra*. In so far as the indictment alleges the existence of houses of ill-fame, I consider it sufficient, but in so far as the allegations affect the defendant I consider it insufficient.

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A form of pleading has been adopted which I consider dangerous to establish as a precedent, and which is a radical departure from safe and well-recognized rules. It is alleged that there were 109 houses of ill-fame, by street and number, in the precinct. They are grouped together and characterized by one designation, covering a period of time of fourteen months. When it is remembered that the proving of the existence of any one house of ill-fame out of the 109 on any one day during that period of time would be sufficient to carry the case to the jury, it will be manifest what an advantage the prosecution would have and what a corresponding disadvantage would weigh upon the defendant. This form may be defended from the standpoint of logical construction, but according to the principles which govern criminal pleading I consider it defective. A defendant is entitled to know what he has to meet, and the channel through which this information is to be conveyed is the indictment, which must contain a plain statement of the act. To be plain it must be definite and certain. While the language is plain, the statement is indefinite.

I do not agree with the contention that the pleading relating to each house should be as precise as if it were against the keeper of that house. It is not necessary. It never is necessary to plead the subsidiary acts with as much particularity as the principal act. But there should be sufficient particularity as to each house, by a distinct and separate allegation as to time, place and description, as would under the general issue warrant the introduction of testimony as to its character and the acts committed therein, and as would enable a court to pass judgment as matter of law on any one allegation, as if it were the only one pleaded. The question is not as to the number of houses designated, but it is that the allegation concerning each house shall be so specific that it can stand alone as a valid pleading. It is not clear to me that the name of the keeper of the house should be set forth. It is true that the names of third persons must be averred whenever they serve to particularize the offense. 1 Chitty Cr. Law, 212–214.

As in People v. Burns, 25 N Y. St. Repr. 97, where the indictment accused the defendant with selling milk of a kind prohibited by statute, but failed to name the purchaser, Justice Ingalls said: "To constitute such sale there must have been a purchaser," and held the omission fatal. But it will be seen that it was not the

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keeping of the milk in which the offense lay; it was the sale, and in order to be a sale there had to be a purchaser. The act could not be complete without a purchaser, and, therefore, the act constituting the crime could not be plainly set forth without naming the purchaser.

Charging a justice of the peace with misconduct at a particular trial, it is not essential to state the names of the persons tried. State v. Foy, 98 U. C. 744.

But a house of ill-fame is of itself a nuisance, without regard to the keeper. It is only when a person is being prosecuted that the name is material. The offense consists *in rem* and not *in personam*.

The gist of the inquiry here would be, "Was there a house of ill-fame at a certain place?" and not, Who kept the house? But it is not necessary to pass upon the question now. Careful pleading ought to set forth the names, if known, and if unknown that fact should be stated.

I conclude that the indictment does not contain a plain and concise statement of the act constituting the crime charged, and I, therefore, allow the demurrer; but inasmuch as in my opinion the objection on which the demurrer is allowed may be avoided in a new indictment, the district attorney may, if he be so advised, resubmit the case to another grand jury.

Demurrer allowed.

THE CITY OF GLOVERSVILLE, Respondent, *v.* ELIHU F. ENOS, Appellant.

(County Court, Fulton County, August, 1901.)

Public health — Milk regulation — Honorably discharged soldier not exempt — When a license fee is not a tax — L. 1893, ch. 661, § 21; 1896, ch. 371.

A regulation of a city board of health, requiring a vendor of milk in the city to register his name each year with its clerk before receiving from the board a permit or license to sell milk in the city for one year, is a reasonable regulation in the interests of public health and is authorized by the Public Health Law.

A soldier, honorably discharged from the service of the United States and as such authorized by statute (L. 1896, ch. 371) to sell

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within the State of New York goods, wares and merchandise by procuring a license therefor, the same to be issued to him without cost, must register yearly if he wishes to sell milk in the city, and where, his license or permit having expired, he refuses to register again and continues selling thereafter, he subjects himself to the penalty imposed by the regulation upon one who holds himself out as possessing a license or permit, when he has none.

The fact that the board of health usually requires from others, not exempt therefrom, a fee of one dollar for the registry and license does not make the regulation void as to the honorably discharged soldier, as upon the facts the fee cannot be deemed a tax nor to have been exacted for the purpose of raising revenue.

APPEAL from a judgment entered in the Recorder's Court of the city of Gloversville in favor of the plaintiff and against the defendant for the sum of ten dollars, for a penalty imposed by the board of health of that city for alleged violation of a regulation adopted by the board of health with reference to the sale of milk within the corporate limits of the plaintiff.

William Green, for appellant.

Frank Talbot, for respondent.

KECK, J. I have not failed to examine with care the exceedingly able and exhaustive briefs submitted by counsel of the respective parties to this action and the many authorities referred to therein upon the main question here involved as to the validity of the regulation hereinafter set forth, and to here state, analyze or criticise such cases, as well as many others examined, is not my purpose in this memorandum. A reference to the undisputed facts as disclosed by the return, with a brief statement of such principles of law as are found in the leading cases applicable and here controlling, as it seems to me, is all that will be undertaken.

It is undisputed that the defendant, who is an honorably discharged soldier of the late Civil War, obtained a license from the county clerk of Fulton county on the 19th day of August, 1897, under and by virtue of chapter 371 of the Laws of 1896, which gave him the legal right to "hawk, peddle and vend any goods,

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wares and merchandise or solicit trade within this state" without paying a license fee therefor; that such right has never been questioned nor has any fee been exacted of him by the plaintiff for the privilege of selling milk within its corporate limits; that after the defendant obtained such license from the county clerk and upon presentation thereof to the board of health of the plaintiff on August 16, 1897, that body issued and delivered to him a permit to sell milk, of which the following is a copy:

"CITY OF GLOVERSVILLE.

"BOARD OF HEALTH.

"PERMIT TO SELL AND DELIVER MILK.

"No. 11.

"E. F. Enos is hereby given a permit for one year from the date hereof, to sell and deliver pure and unadulterated milk within the City of Gloversville.

"CONDITIONS.

"*First:* This permit is given in accordance with the regulations of the Board of Health of the City of Gloversville and the Laws of the State of New York.

"*Second:* It is understood and agreed that the holder of this permit shall obey and faithfully observe the ordinance of the Board of Health of said city and the laws of the State of New York, relating to the sale and delivery of milk within said city.

"*Third:* The holder of this permit shall have conspicuously displayed upon the vehicle from which he vends milk or cream, the number of this permit.

"Dated, GLOVERSVILLE, N. Y., this 16 day of *August,* 1897.

"CHARLES NICHOLLS,
"*President of Board of Health.*

"R. H. GWILLAM,
"*Clerk.*"

That defendant has ever since sold pure and wholesome milk within said city; that prior to the issuing of said permit to the defendant by said board of health, that body had adopted and published in all respects as required by law, the following regulation, viz.:

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"REGULATION 15. Milk License.— No milk which has been watered, adulterated, reduced or changed in any respect by the addition of water, or any other substance, thing or material, shall be brought into said city, or held, sold, kept or offered for sale at any place therein. All vendors of milk shall register their names with the Clerk of the board, who shall issue to them a certificate of authority to sell milk, under his hand and seal. Every person so authorized to sell shall place in a conspicuous place on both sides of his milk wagon or sleigh the number of the license. Milk tickets shall be used but once. The certificates issued as above shall continue in force one year from the date of issue. Every person who holds himself out as possessing such certificate without having taken out the same, or after the same has been revoked, or has expired, shall be liable to a penalty of ten dollars."

That the permit issued to the defendant by said board of health was so issued to him pursuant to the provisions of such regulation and without fee. The charge made by plaintiff in its complaint is mainly that the defendant violated the provisions of this regulation by refusing to again register his name with the clerk of such board of health, since the expiration of the year mentioned in the permit issued to him as aforesaid, and to receive, without cost or expense, a permit to sell milk within the corporate limits of the plaintiff as required by the provisions of such regulation. This regulation is assailed by the defendant as being illegal for various reasons, and especially so for the reason that a fee of one dollar, which is in the nature of a tax and a means of raising revenue to the plaintiff is usually exacted, also that it is unreasonable and oppressive, consequently absolutely void. If this contention on behalf of the defendant can be upheld, then there is no doubt but that under well-established rules of law this action cannot be maintained, and the defendant subjected to the payment of a fine of ten dollars imposed by the board of health, and for which judgment was rendered against him, notwithstanding the fact that no fee was demanded of him. If the regulation contains elements or provisions not authorized by, or contrary to law, the defendant can take advantage of it the same as if a fee had been exacted of him. It is provided by section 21 of chapter 661, Laws of 1893, known as the Public Health Law, that every local board of health "shall make and publish all such orders and regulations as they

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deem necessary for the preservation of life and health, and the execution and enforcement of the public health law in the municipality." Here then is found ample power to the local board of health to enact such rules and regulations as may be deemed necessary and proper for the promotion and preservation of life and health, and the enforcement of the same within the community for which such board acts. Regulations thus made must, of course, have reference to the comfort, safety and welfare of society, and must be reasonable with respect to the matters with reference to which they are enacted. They must not be oppressive, or made a means of raising revenue to the municipality, for the promotion of the welfare of whose inhabitants they are thus authorized by statute to be enacted. Has the regulation here in question in any of its provisions invalidated any of these prohibitory legal principles, thereby requiring or justifying a holding that it is void? I think not, as it has reference to the inhabitants of a municipality and their health, comfort and safety, is reasonable, not oppressive and cannot, I think, be said to be a source of revenue to the plaintiff, and is upheld by the greater weight of authority found in the leading cases on the subject. No one, I think, will doubt the wisdom or propriety of the people of the State in their enactment through their law-making power, of the Public Health Law above referred to, by the provisions of which municipalities throughout the State are empowered, largely through their local boards of health, to exercise extreme vigilance over the sale of the commodity here in question, which is perhaps more generally used and of greater necessity as an essential ingredient of food, than most any other sold or distributed in the community. The requirements, therefore, in the regulation under consideration that "all vendors of milk shall register their names with the Clerk of the Board, etc.," from time to time, can hardly be said to be without useful purpose on the part of the municipality, as it enables it to exercise the proper care and vigilance in detecting and preventing the sales of adulterated or impure milk in its limits. Guided, therefore, by what seems to me to be the correct principles of law running through all the leading cases, I have reached the conclusion that the regulation is valid and enforceable the same as if it had been a local statute enacted by the Legislature of the State.

The remaining question for determination is whether or not a veteran who has procured a license from the county clerk under

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the provisions of chapter 371, Laws of 1896, above-referred to, and who is thereby given the absolute right to hawk, peddle or sell anywhere within the State, is relieved or excused from compliance with the rules and regulations of a municipality wherein he makes such sale. There is nothing in this statute, however, that gives any right to a veteran licensed under it, other than to sell anywhere in the State without paying any license fee therefor, and to that extent it discriminates in his favor but no further. It contains no provisions relieving him from a compliance with any lawful regulations, police or otherwise, in force in any particular municipality in which he undertakes to make sales; hence, its scope cannot be enlarged by any interpretation that may be given to it so as to justify such a holding. Entertaining these views of the law applicable to the facts of this case briefly (as well as imperfectly) stated, I am unable to reach any other conclusion than that the judgment appealed from should be affirmed, with costs, and an order is directed to be entered accordingly.

Judgment affirmed, with costs.

WENZEL CZECH, as Temporary Administrator, Etc., Plaintiff, *v.* LILLIAN B. BEAN et al., Defendants.

(County Court, Jefferson County, August, 1901.)

Foreclosure — Appointment of temporary administrator — Collateral attack — Presumption of death — Tender.

A temporary administrator, whose function is only to collect and preserve the estate, may be appointed upon much weaker proof, raising a presumption of the death of the intestate, than a permanent administrator.

If there was slight proof of such a character before the surrogate at the time when he appointed a temporary administrator, the appointment cannot be questioned collaterally.

There is no arbitrary rule as to the length of the continued absence which will raise a presumption of the absentee's death.

A formal tender of the principal is necessary to stop interest.

ACTION for the foreclosure of a mortgage.

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Joseph Nellis, for plaintiff.

Rogers & Atwell, for defendants.

EMERSON, J. The plaintiff prosecutes this action as temporary administrator of one Henry Czech, for the foreclosure of a mortgage executed to said Czech by the defendants on February 1, 1894. The plaintiff is the father of Henry Czech and came from Austria to this country in 1884. He was naturalized in 1892 and since the year 1887 has resided at Sacket Harbor, in the county of Jefferson. The plaintiff's wife remained in Austria, where she still resides, but his son, Henry, followed him to this country in 1886, he then being a lad seventeen years of age. Henry enlisted in the 11th United State Infantry November, 1886, in Dakota, and came to Madison Barracks, Sacket Harbor, with that regiment in 1887. He served his full term of enlistment at Sacket Harbor and was discharged at that place in 1892. He then re-enlisted in the 9th United States Infantry, at Sacket Harbor, and was sent with his company to Oswego. After serving three years on this second enlistment he was discharged at Sacket Harbor in February, 1895. In March, 1895, he went to New York, taking a satchel with him, but leaving the rest of his clothing with plaintiff, and on August 10, 1895, he again re-enlisted in New York in the 21st United States Infantry, then stationed at Plattsburg, N. Y. He remained with his regiment at Plattsburg until March 14, 1898, when he deserted and returned to Austria. The plaintiff last saw him at Plattsburg shortly before his desertion in the spring of 1898. In December, 1899, the plaintiff wrote to Henry at his old home in Austria, but the letter was returned unanswered. The plaintiff then wrote to his wife in January or February, 1900, and received an answer to the effect that Henry staid at home in Austria about six weeks and then left, stating he was going to return to the United States, since which time he has not been seen or heard from. On May 1, 1900, the plaintiff applied for and received from the surrogate of Jefferson county letters of temporary administration upon papers showing substantially the above facts, and the further facts that Henry was a sober and industrious young man who corresponded regularly and at short intervals with the plaintiff prior to his desertion. That he took with him to Austria up-

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wards of $250 in money and wrote to plaintiff soon after he reached that country, since which time nothing has been heard from him. The proof before the surrogate further showed that inquiries had been made at the main sea ports of Germany and no information could be obtained of his embarkation.

During all the time subsequent to the first enlistment the plaintiff resided at Sacket Harbor, and Henry was discharged and reenlisted at that place, except on the occasion of his last enlistment, when he went to New York, taking a satchel as above stated, but leaving his other clothing and belongings at Sacket Harbor. The mortgage recited his residence at Sacket Harbor and it was left in the custody of plaintiff at that place until Henry went to New York to enlist, when he took the mortgage with him, leaving the insurance policy in the possession of plaintiff. There is no contest in this case over the execution of the mortgage or the amount due thereon, but the title of the plaintiff and his right to enforce and collect the same is challenged by the defendants. Herein rests the sole defense interposed by the defendants.

This leads to an inquiry into the jurisdiction of the surrogate to appoint the plaintiff temporary administrator, for if jurisdiction existed then by force of section 2672 of the Code, the plaintiff could maintain this action.

A surrogate's court is one of limited jurisdiction, and persons claiming under the decrees of that court must allege and prove the facts necessary to confer jurisdiction. Matter of Hawley, 104 N. Y. 250-262; Matter of Law, 56 App. Div. 454-458.

It is, however, provided by the Code of Civil Procedure that when such jurisdiction is drawn in question collaterally, and the necessary parties have been cited, it is presumptively established, and in the absence of fraud or collusion is conclusively established by the allegations contained in the papers used before the surrogate. Code, § 2473.

Another rule of law well established in cases of collateral attack upon the judgments of courts of inferior and limited jurisdiction, is that if there is a total defect of evidence to sustain the jurisdiction such judgment will be pronounced void; but if there was proof which had a legal tendency to make out a proper case, even though slight and inconclusive, the adjudication will be upheld until set aside on a direct proceeding for that purpose. Staples v. Fairchild, 3 N. Y. 41; Sheldon v. Wright, 5 id. 497;

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Roderigas v. East Riv. Sav. Inst., 63 id. 460; Skinnion v. Kelley, 18 id. 355; Carleton v. Carleton, 85 id. 315; Miller v. Brinkerhoff, 4 Den. 118; People ex rel. Tweed v. Liscomb, 60 N. Y. 568; Potter v. Ogden, 136 id. 396.

In the application of the above rules of law to this case, it will be observed that the temporary administration which the Code authorizes differs materially from a general administration as in case of intestacy. The office of a temporary administrator is to collect and preserve, rather than to distribute, as in case of administration-in-chief. He was formerly called a collector, receiver and trustee, and his powers are now defined by the Code and their exercise circumscribed by conditions looking to the preservation of the property for the absent owner in case he should eventually return. It is not, therefore, to be expected, so far as the presumption of death is concerned, that the same certainty should be proven as in cases of general administration. The Code seems to recognize this distinction and provides that when a person of whose estate the surrogate would have jurisdiction if he was shown to be dead, disappears or is missing, so that after diligent search his abode cannot be ascertained, and under circumstances which afford reasonable grounds of belief either that he is dead or has become a lunatic, or has been secreted, confined or otherwise unlawfully made away with, a temporary administrator may be appointed when necessary for the protection of his property or the rights of his creditors and those who would be interested in the estate if he were dead. Code, § 2670. In proof of the essentials required by the above section, I have no doubt but if Henry Czech had died the surrogate of Jefferson county would have had jurisdiction to administer his estate. The facts of the case all tend strongly to show that his legal residence was Sacket Harbor at the time of his last enlistment, and it, therefore, continued at that place until the time of his desertion. N. Y. Const., art. II, § 3. And besides the fact of residence, the surrogate has jurisdiction to administer the estate of a nonresident where he left property within the county. For the purpose of conferring jurisdiction in such a case, a debt owing to decedent by a resident of the State is regarded as personal property within the county of the debtor. Code, §§ 2476, 2478.

The mortgage in this case contains a covenant to pay, and, therefore, if Henry Czech was a nonresident at the time of his

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disappearance, the mortgage debt must be construed as property within the county of Jefferson. There was also sufficient proof before the surrogate that Henry Czech had disappeared or was missing, and that after diligent search the place of his abode could not be ascertained. Whether there was sufficient proof to afford reasonable ground to believe that he was dead, insane, or had been unlawfully made away with, presents, however, a more difficult question. He deserted from the army on March 14, 1898. His mother states that he spent about six weeks in Austria before his disappearance, and the letters in this case were granted on May 1, 1900. At most, therefore, he had been absent less than two years when temporary administration was granted. This leads us to consider what presumptions of death may be indulged in from such an absence. At common law the continuance of human life was presumed until the contrary was proven, but the statutes as to bigamy and life estates (1 Jac. 1, chap. 11, § 2; 19 Car. 11, chap. 6, § 2) made an inroad upon this doctrine by providing that in certain cases a presumption of death might be indulged in after an absence of seven years. This rule was afterwards extended by way of analogy to cases beyond the provision of the statute, and it finally became established that when a party had been absent for seven years without any intelligence as to his whereabouts he was in contemplation of law presumed to be dead. The statutes of James and Charles have, with some modifications, been re-enacted in our State. Penal Code, § 299; Code Civ. Pro., § 841.

And the rule of presumption as to death after an absence of seven years which by analogy is extended to other cases has been frequently declared and applied in the courts of our State. Duke of Cumberland v. Graves, 9 Barb. 595, 608; Sheldon v. Ferris, 45 id. 124; King v. Paddock, 18 Johns. 141; McCartee v. Camel, 1 Barb. Ch. 455.

There is, however, no arbitrary or positive rule in respect to the time when the presumption of death may be drawn from the continued absence of a person. While in analogy to the above statutes seven years is usually adopted as a basis for the application of the presumption, yet it is not absolutely necessary that such a period should elapse, but the length of time required may be abridged and the presumption sooner applied upon proof of special circumstances tending to show an earlier death. In the

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latter case the presumption is to be determined as a question of fact upon the evidence as to when the death probably occurred. Merritt v. Thompson, 1 Hilt. 550; Eagle v. Emmet, 4 Bradf. 117.

As an original proposition, I should hesitate to find from the proof adduced before the surrogate that there was reasonable ground to believe that Henry Czech was dead, insane, or had been unlawfully made away with. He had been absent less than two years, and the fact that he was a deserter from the United States military service would furnish a substantial reason for concealing his identity if he in fact returned to this country. In my judgment, the evidence falls far short of raising any reasonable presumption of death. Dunn v. Travis, 56 App. Div. 317; Keller v. Stuck, 4 Redf. 294.

The question presented, however, is not what this court would have decided if the matter had been presented as an original proposition, nor whether the finding that there was reasonable ground to believe the party dead, insane, or unlawfully made away with, is supported by the evidence and would stand the test of a review, but is whether there was any proof before the surrogate which tended to that conclusion. In my judgment, there was such proof, and while taken as a whole it is far from satisfactory, yet it was sufficient to confer jurisdiction upon the surrogate under the rules of law which have been sanctioned and applied in the cases above cited. See, also, Brown v. Landon, 17 Wkly. Dig. 460; Vanderpoel v. Van Valkenburgh Co., 6 N. Y. 190; Wetmore v. Parker, 52 id. 450, 456; Welch v. N. Y. C. R. R. Co., 53 id. 610.

All the other jurisdictional facts were either alleged before the surrogate or proven to exist on the trial. This would seem to be sufficient. Roderigas v. East Riv. Sav. Inst., 7 N. Y. 316–323.

Under the circumstances of this case, the defendants would, in my judgment, be protected in paying the mortgage to the plaintiff. Indeed, it has been held that where administration was granted upon the estate of a person who was still living, there being evidence before the surrogate tending to show that he was dead, a debtor of the estate would be protected in making payment of the claim to such administrator. Roderigas v. East Riv. Sav. Inst., 63 N. Y. 460; Schluter v. Bowery Sav. Bank, 117 id. 129.

The defendants urge that they should not be charged with interest since December 1, 1899, as they were then ready and will-

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ing to pay the mortgage. There was no formal tender made at the time, and, in the absence of such a tender, I do not think enough occurred to stop the running of the interest. Halpin v. Phenix Ins. Co., 118 N. Y. 166.

The defendants, however, were not in the attitude of denying their liability to pay the mortgage. They were ready and willing to pay, and only contested the right of plaintiff to collect the same. His right, to say the least, was shrouded in considerable doubt; so much so, that I think the defendants were fairly justified in making the contest that they did. Under these circumstances, no costs should be allowed against the defendants, and a decree of foreclosure should be ordered, without costs, unless the plaintiff releases the defendants from all personal liability, in which case the plaintiff should have costs, payable out of the mortgage debt. Findings may be prepared and, if not agreed to, settled before me on three days' notice. The plaintiff's attorney will serve a copy of this opinion, with the proposed findings.

Ordered accordingly.

Matter of the Petition of EDWARD F. WOOLSTON and JOHN LUDLUM for an Order Requiring a Special Town Meeting to be Held in the Town of Yates under the Provision of the Liquor Tax Law.

(County Court, Orleans County, August, 1901.)

Liquor Tax Law — Form of town clerk's notice of submission of local option — Resubmission refused where there were only possible slight defects in posting and publishing.

A town clerk's statutory public notice that the local option questions will be voted upon at the next town meeting need not state that all of the four questions will then be voted upon nor need they be set out in full.

The notice is sufficient where, under the heading "Local Option To determine whether liquors shall be sold under the provisions of Section 16, Chapter 367, Laws of 1900, known as the Liquor Tax Law", it proceeds to state that a vote will be taken by ballot "upon said proposed questions" at the next town meeting.

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The statute, in so far as it relates to notice, is merely directory, and where it appeared that there might possibly have been slight errors in the posting and publishing of some of the notices, the court held a resubmission unnecessary and unjustifiable.

APPLICATION under section 16 of the Liquor Tax Law for an order directing a special town meeting to be called to vote upon the local option questions provided for in said section, on the ground that said questions were not properly submitted to the electors of said town at the regular town meeting held in March, 1901.

Thompson & Sons, for petitioners.

William G. Van Loon, for State Commissioner of Excise.

RAMSDALE, J. This is an application under section 16 of the Liquor Tax Law for an order directing a special town meeting to be called to vote upon the local option questions provided for in said section 16 of the Liquor Tax Law, on the ground that said questions were not properly submitted to the electors of said town at the regular town meeting held in March of the present year.

The petition shows that the town clerk did, on or about March 1st, and more than ten days before the holding of the town meeting, cause to be posted in more than four public places of the town a notice, the pertinent parts of which were as follows:

"NOTICE OF QUESTIONS TO BE SUBMITTED.

"LOCAL OPTION

"To determine whether liquors shall be sold under the provisions of Section 16, Chapter 367, Laws of 1900, known as the Liquor Tax Law.

"Now, therefore, notice is hereby given that a vote will be taken by ballot upon said proposed questions at the next biennial Town Meeting of said Town of Yates to be held on the 12th day of March, 1901.

"Dated YATES, *February* 25, 1901.

"LEIGH HILL,
"*Town Clerk.*"

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That he caused said notice to be published in the Medina *Tribune,* a paper published in the county, on Thursday of the week commencing February 24, 1901.

That thereafter said town clerk caused said notice to be so changed as to read as follows:

"LOCAL OPTION

"To determine whether liquors shall be sold under the provisions of Section 16, Chapter 367, Laws of 1900, known as the Liquor Tax Law. Amended. Now, therefore," etc.

That on the 2d and 4th days of March, 1901, the said town clerk caused said changed notice "to be posted in more than four public places in said town of Yates in place of the notice firstly hereinabove set forth;" but that there were not four of such changed notices posted until March fourth; that he also caused said changed notice to be published in the Medina *Tribune* on Thursday of the week commencing March third.

Section 16 of the Liquor Tax Law provides that, upon filing with the town clerk the proper request that the several propositions be voted upon at the town meeting, he shall, at least ten days before the holding of such town meeting, cause to be printed and posted in at least four public places of such town a notice of the fact that all of the local option questions provided for therein will be voted upon at such town meeting or general election; and that said notice shall also be published at least five days before a vote is to be taken once in one newspaper published in the county in which such town is situated.

The contention of the petitioners is that the town clerk failed to perform the duty imposed upon him by said section, in that he did not, in his notice, say that *all* of the questions mentioned in section 16 would be submitted to the voters, and that he did not set forth all said questions at large in said notice. It is also claimed that he did not post four of said changed notices in said town at least ten days, and did not publish the same five days before the holding of the town meeting; that, on account of these alleged defects, the propositions were improperly submitted, and that a special town meeting should be called for the purpose of having said propositions properly submitted and voted upon.

There is no allegation in the petition or papers accompanying

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it that any elector was misled in any way by the action of the town clerk, nor is it alleged that a full vote was not cast upon the several propositions mentioned in section 16; but, on the contrary, it does appear, from the petition and the affidavit read in opposition to the motion, that on at least one of the propositions there was cast for and against 406 votes (including blank and void ballots), and that the whole number of votes cast for the office of supervisor at said town meeting was 409, and that more than a majority of 409 votes were cast against all of said propositions, except the third.

First. As to the sufficiency of the form of the notice.

The statute provides no specific form of notice to be given. The requirement is that the town clerk shall cause to be printed and published a "notice of the fact that all of the local option questions provided for herein (§ 16) will be voted on at such town meeting." I think the notice in this case complies with the requirement of the statute. It is headed "Local Option." It then goes on to say that it is to determine whether liquors shall be sold under the provisions of section 16 of the Liquor Tax Law, giving the chapter and year. It certainly was enough to put the elector on inquiry, and, by looking at the statute indicated, he could not help actually knowing what *all* the local option questions provided for in section 16 are, to say nothing of the legal presumption that every one knows the law.

By the notice as given, he is directed to a particular section of a general statute of the State (and which is accessible at all times to him), where he can get actual knowledge of *all* the matters he is required to pass upon.

The object of the requirement of notice is, I take it, not so much to give, in exact words, the precise questions to be voted on (for the statute distinctly provides that all four of the questions enumerated in section 16 shall be submitted) as to give the information that the preliminary steps required by the statute have been taken — that the petition has been filed, etc. — and that the general question of local option is up for decision by the people.

The elector is presumed to know what the law is, and what particular questions he will have to vote upon when the general question is up, but he is not presumed to know the fact that the proper petition has been filed to allow the general question to come up. The notice in this case gives this information. There

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is nothing misleading about it, nor is it claimed that any one was misled by it. There is no intimation in the papers but that the will of the people was fairly expressed by the vote taken, but, on the other hand, the papers do show that there was a full and fair expression of the sentiment of the electors, and that such sentiment is the same as has existed in the town for years past.

In People ex rel. Crane v. Chandler, 41 App. Div. 178, the Appellate Division of this department decided that a notice that "The license question, as provided by the Raines law, will be submitted to the voters at this town meeting" was a good and sufficient notice. If that notice was good, then the one in this case certainly is.

But the point is made that that decision does not apply in this case, for the reason that the Liquor Tax Law did not, at that time, provide for any notice. The answer to this is that notice of the submission of all such propositions, in substantially the same form and manner as now provided for in section 16, was provided for in the Town Law, and that notice was as obligatory then as now. Matter of Eggleston, 51 App. Div. 38.

If too much particularity is required in carrying out the provisions of these statutes, then they will, in more instances than not, defeat themselves, and the will of the people, which is the controlling object to be safeguarded, will be subverted. The individuals to whom the Legislature has delegated the duty of performing these services are not, in the vast majority of cases, persons learned in the law, but are persons of ordinary education and business ability, and this the Legislature knew. In giving judicial interpretation to the law, and the sufficiency of compliance with it, these facts ought to be taken into consideration, and where there is a substantial compliance with its provisions, and no fraud, concealment or deception is practiced, the acts of the officials should be upheld.

Second. As to the time within which the notices were published and posted.

The first or original notice was published and posted in ample time. Of this there is no dispute. The changed notice was published on the seventh of March, and the town meeting was on the twelfth. Some of the changed notices were posted on the second. These acts were both done in time. People v. Burgess, 153 N. Y. 561.

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It does not appear, either, but that at least four of the original notices remained up, or were not "changed." In any event, I think the statute is directory as to the time of the notice, and that a new town meeting should not be called, with the annoyance and expense attendant thereon, for the slight error of the clerk, if, indeed, there was one.

In People ex rel. Crane v. Chandler, *supra*, a notice posted four days before the town meeting was held sufficient, and in Matter of Rowley, 34 Misc. Rep. 662, a proceeding under the very law here in question, Justice Rich held that *no* notice by the town clerk was necessary to the validity of the election, when it was shown that the electors had actual notice and a full vote was polled.

I think a fair expression of the choice of the electors of the town was had at the regular town meeting, and that no such error was committed by the town clerk or other officer as should vitiate it.

The motion for an order directing the calling of a special town meeting is, therefore, denied, but without costs.

Motion denied, without costs.

JOHANNAH SOUTHWELL et al., by Guardian, etc., Plaintiffs, *v.* JOHN R. GRAY, Administrator, etc., Defendant.

(Supreme Court, Erie Special Term, September, 1901.)

Benefit insurance — Survivorship, where husband and wife die together — Interest of beneficiary in death benefit an expectancy — Funeral expenses not a lien — State control of foreign corporation — L. 1892, ch. 690, §§ 233, 238.

Where a husband and second wife die in the same night from being poisoned by the escape of natural gas from a stove in their room, there is, in the absence of any evidence upon the point, no presumption that one survived the other.

The interest, in a death benefit, of the beneficiary is a mere expectancy which is subject to be defeated by a failure to survive the insured.

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Where a second wife and her husband occupying the relations of beneficiary and insured to a fund, shown by the certificate of incorporation, constitution and by-laws of the insuring corporation, to be intended for the widow, children, relatives or dependents of the insured, died in the same night, it was held that no interest in the fund ever vested in her or in her next of kin, and that, under provisions of the policy controlling distribution in a case where the designation made by the insured failed "for illegality or otherwise", the fund passed to the children of his first marriage.

The funeral expenses of the husband and second wife, paid by the administrator of her next of kin, are not a legal charge upon the fund.

A foreign corporation lawfully doing business in the State of New York is subject to such of its laws as govern similar domestic corporations.

ACTION to establish the ownership of $3,000, the proceeds of a benefit certificate issued by the Supreme Council of the Royal Arcanum.

George A. Davis, for plaintiffs.

William W. Hammond and Leroy Andrus, for defendant.

KENEFICK, J. This controversy is about the ownership of $3,000, the proceeds of a benefit certificate issued by the Supreme Council of the Royal Arcanum, a fraternal assessment insurance corporation, upon the life of Peter Southwell. The insured was twice married. The plaintiffs are his children by the first marriage. The defendant is the administrator of the estate of Flora Ada Southwell, his second wife, who died intestate, leaving as her surviving next of kin a mother and two brothers. The action was originally instituted against the corporation, but, as it admitted its liability on the policy, the present defendant, who claimed the right to the fund, was interpleaded in the action. The defendant claims the fund as the legal representative of the second wife, who was the beneficiary designated in the certificate. The plaintiffs contend that such designation became inoperative, as the beneficiary did not survive the insured, and that thereupon the fund

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passed to them by virtue of the laws of the corporation, which are hereinafter referred to.

The insured and his beneficiary were found dead in the same bed at their home in Austin, Penn., on the afternoon of January 3, 1900. Death in each case was due to natural gas poisoning. Both were alive on the preceding night. It is assumed that the inhalation of poisonous gases, which escaped during the night from a stove in the room burning natural gas, effected their death. Death came to them as they slept. Upon the trial the defendant made an effort to establish that the insured died first. Evidence was given as to the physical condition in life of each of the deceased persons, the post mortem appearance and condition of the bodies and the position of the bodies when found with reference to the stove and the windows and walls of the room, and a hypothetical question embracing the facts so testified was submitted to several physicians for their opinion as to who survived. The physicians called by the defendant expressed the opinion that the insured died first; an equal number of physicians called by the plaintiffs testified that it was impossible upon such data to express an opinion upon the subject of survivorship with any reasonable certainty. It would serve no useful purpose to discuss here the reasons assigned by the various medical witnesses for their answers to this question, inasmuch as the court, after careful consideration, has reached the conclusion that it would be mere conjecture, surmise and speculation to essay the decision of survivorship in this case upon such testimony. This controversy must be determined, therefore, upon the assumption that there is no proof to decide which of these individuals predeceased the other. Under such circumstances the civil law indulges in presumptions based on age and sex to aid in determining the survivorship of persons perishing in a common disaster. The common law, however, recognizes no presumptions on the subject. In the absence of evidence, the fact is assumed to be unascertainable, and a rule of distribution has been adopted whereby property rights are disposed of as if death occurred simultaneously. Newell v. Nichols, 75 N. Y. 78.

It is conceded that as to wills this rule lapses a legacy in the event of the death of the testator and legatee in a common disaster, for the reason that there is no period of time intervening between the death of the testator and the death of the legatee

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in which the legacy can vest. It is urged, however, that this rule has not the effect of diverting the benefit fund from the next of kin of the beneficiary under such a life insurance policy as we have here.

This claim calls for an examination of the contract entered into between the corporation and the insured. The contract in this form of insurance is found in the statute under which the corporation was organized, its by-laws, together with the application for and the certificate of membership, and these instruments construed together measure the rights of litigants for the proceeds of the benefit certificate. Sabin v. Phinney, 134 N. Y. 428.

Let us proceed to an analysis of this contract. The corporation was organized under the laws of Massachusetts, but the statute under which it was called into existence is not before the court. The insured was a member of one of its subordinate councils located in the city of Buffalo, this State. It is conceded that the corporation was lawfully doing business in this State. It was, therefore, subject to the provisions of our laws governing similar corporations. Ins. Law, L. 1892, ch. 690, § 233.

The primary purposes of the corporation as set forth in its certificate of incorporation are: "To establish a fund for the relief of sick and distressed members and one for a widows and orphans' benefit fund." Among the aims and purposes of the corporation as stated in its constitution is the establishment of a "widows and orphans' benefit fund from which on satisfactory evidence of the death of a member of the order who has complied with all its lawful requirements a sum not exceeding three thousand dollars shall be paid to the wife, children, relatives of or persons dependent upon such member as limited and described in the laws of said order relating to benefit certificates as he may direct in accordance with said laws." The laws of the order (§ 324) limit the insured in his designation of a beneficiary to the following relatives or dependents of the insured, viz.: Class first, grade (1) wife; (2) children, children by legal adoption and children of deceased children; (3) grandchildren; (4) parents and parents by legal adoption; (5) brothers and sisters of the whole blood; (6) nieces and nephews; (9) cousins in the first degree; (10) aunts; (11) uncles; (12) next of kin who would be distributees of his personal estate upon his death intestate; and class second, any affianced wife of the insured, or any person who is dependent

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upon him for maintenance. The laws of the order, as well as our statute, permit the member to change his beneficiary at any time without the consent of the prior designated beneficiary. Ins. Laws, § 238.

By the terms of the benefit certificate issued to the insured the corporation bound itself to pay the beneficiary out of the widows and orphans benefit fund "in accordance with and under the provisions of the laws governing said fund upon satisfactory evidence of the death of said member."

The laws of the corporation make the following provisions in the event of the designation of the beneficiary becoming inoperative, to-wit:

Section 330. "If any designation shall fail for illegality or *otherwise,* then the benefit shall be payable to the person or persons mentioned in class first, sec. No. 324, if living in the shares and order of precedence by grades as therein enumerated, the persons living of each precedent grade taking in equal shares per capita to the exclusion of all persons living of subsequently enumerated grades. * * * If no one of said class first shall be living at the death of the member the benefit shall revert to the widows and orphans' benefit fund."

Section 332 provides: "In the event of the death of all the beneficiaries designated by the member in accordance with the laws of the order before the decease of such member, if he shall have made no other or further disposition thereof as provided in the laws of the order, the benefit shall be disposed of as provided in section 330, excepting that if in such event the member shall leave him surviving his wife and a minor child or children of a marriage prior to that with such wife, the benefit shall be payable as follows: One-third thereof to such wife and two-thirds thereof to all the minor children of such member equally."

What are the respective rights of the insured and the beneficiary under this contract? Judge Finch, writing for the court, in Smith v. N. B. Society, 123 N. Y. 88, referring to the provision of our insurance law permitting the insured to change his beneficiary at will, thus defines these rights: "That section attaches the beneficial interest to the membership, and permits the member to change the payee or beneficiary of the insurance without the latter's consent. Where the right of the payee has no other foundation than the bare intent of the member, revocable

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at any moment, there can be no vested interest in the named beneficiary any more than in the legatee of a will before it takes effect."

If the designated beneficiary pre-deceases the insured the death benefit does not pass to the representatives of the beneficiary. Hellenberg v. Dist. No. One, 94 N. Y. 580; Simon v. O'Brien, 87 Hun, 160.

If the laws governing the corporation make provision for the payment to other persons upon such a contingency, such laws control (Simon v. O'Brien, *supra*); in the absence of such provision no liability exists on the part of the corporation. Hellenberg case, *supra*.

The principle to be deduced from these cases is that the interest of the beneficiary is a mere expectancy subject to be defeated either by a change of designation by the insured or by the failure of the beneficiary to survive the insured. As the rule of distribution laid down in Newell v. Nichols, *supra*, is in effect, a presumption against the survivorship of either, the expectancy of the beneficiary never ripened into a vested right which could be transmitted to her legal representative. It is asserted, however, that, under the language of section 332 of the laws of the corporation above quoted, the event which renders the designation inoperative is the death of the beneficiary "before the decease" of the insured.

In view of the nature of the contract and the interests acquired thereunder, as established in the cases above cited, this language must be construed to mean that the designation fails if the beneficiary does not survive the insured. Fuller v. Linzee, 135 Mass. 468.

Under the certificate of incorporation of the society, as well as under its constitution and laws referred to above, this fund was intended for the widow, children, relatives or dependents of the *insured;* it was not in the power of the insured to designate as beneficiaries the persons represented by the defendant. Yet the practical effect of sustaining the defendant's claim would be to divert the fund from the insured's children and pass it directly to the relatives of the beneficiary.

Our State furnishes no reported case where the precise question here involved has been adjudicated. The authorities in other jurisdictions are in conflict.

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The right of the legal representatives of the beneficiary to the fund is affirmed in Maryland (Cowman v. Rogers, 73 Md. 403) and in Missouri (Supreme Council Royal Arcanum v. Kacer, Admr., not yet reported), and is denied in Texas (Paden, Admr., v. Briscoe, 81 Texas, 563), and in a recent case in Illinois (Balder v. Middeke, 92 Ill. App. 227).

The reasoning in the last two cases accord with the views here expressed, and the result attained thereby is in harmony with the spirit and purposes of the contract.

It follows, therefore, that as the beneficiary did not survive the insured, the proceeds of the benefit certificate passed under the laws of the corporation to the plaintiffs.

The funeral expenses of the insured and his wife, which were paid by the defendant, are not legally chargeable against this fund (Ins. Law, § 238), however great may be the moral obligation resting upon the plaintiffs to reimburse the defendant.

Judgment is directed for the plaintiffs accordingly, but without costs.

Judgment for plaintiffs, without costs.

PATRICK CONNOLLY, Plaintiff, *v.* ROBERT A. VAN WYCK et al., Commissioners of the City of New York, of New York East River Bridge Commission and the City of New York, Defendants.

(Supreme Court, New York Special Term, September, 1901.)

Taking property by eminent domain before paying for it — Injunction pendente lite — L. 1897, ch. 378, § 1439.

A statute authorizing a city to take private property under the right of eminent domain, and not providing for payment therefor before or concurrently with the taking, is constitutional where it does provide a sure, sufficient and convenient legal remedy by which the property owner can coerce payment.

Where the continuance of a preliminary injunction would practically terminate the litigation, and in favor of the plaintiff, the motion for a continuance should be granted with great caution and must be denied where the right to ultimate relief is in serious doubt.

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MOTION to continue injunction *pendente lite.*

Timothy J. Campbell (Thomas W. Pittman, L. J. Morrison, of counsel), for plaintiff.

John Whalen, Corporation Counsel, George Hill, Assistant Corporation Counsel, for defendants.

BLANCHARD, J. The plaintiff is the owner of premises in the city of New York which the defendants, the commissioners of the city of New York East River bridge commission and the city of New York, had proposed to take possession of on July 3, 1901, pursuant to an act of the Legislature of the State of New York. The commission was created by chapter 789 of the Laws of 1895, and by chapter 652 of the Laws of 1899, section 2, power was conferred upon it, with the approval of the board of estimate and apportionment, to acquire title to lands by condemnation in the manner provided by chapter 21 of the Greater New York charter. By section 1439 of that act the title of the property condemned may be vested in the city, and the buildings thereon sold before the compensation to the property owner is made or the amount of the award determined. It is of this that the plaintiff complains. He seeks a temporary injunction restraining the defendants from proceeding to acquire his property and from selling the house thereon prior to the award for compensation being determined. He claims that the act, in so far as this is permitted to be done, is unconstitutional, because without due process of law his property is taken without just compensation being awarded him, in violation of the Constitution of the United States, and of the State. The courts of this State have decided that such a provision is not a violation of our Constitution. Mr. Justice Patterson, in Matter of Mayor, in the Elm street widening proceeding, in a well-considered opinion (N. Y. L. J., Feb. 8, 1895), held it to be the settled law of this State that a provision of statute law authorizing the taking of private property by the State, or one of its municipalities under the right of eminent domain, without providing for payment prior to or concurrently with the taking, is constitutional if a sure, sufficient and convenient remedy is provided by which the owner can subsequently coerce payment by legal proceedings, and the cases of Sage v. City of Brooklyn, 89

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N. Y. 195, and Matter of Mayor, 99 N. Y. 577, are cited with approval. In further support of the principle announced, the cases of Sweet v. Rechel, 159 U. S. 380; Mayor v. Wright, 12 N. Y. Supp. 20, and Hill v. Wine, 35 App. Div. 520, may be referred to. I must, therefore, conclude that no constitutional provision is violated in this case. The granting of the preliminary injunction, following as it does the language of the prayer of the complaint, would, in effect, determine the litigation by affording to the plaintiff the same relief he would succeed in obtaining after a trial, should he there prove successful. It should, therefore, be granted with great caution and only when necessity requires. Bronk v. Riley, 50 Hun, 489, 492. And where, as in this case, the right to ultimate relief is, to say the least, involved in serious doubt, a preliminary injunction should not be allowed. The motion to continue the injunction *pendente lite* is denied, and the preliminary injunction heretofore granted is vacated, with ten dollars costs to defendants to abide the event.

Motion denied and preliminary injunction vacated, with ten dollars costs to abide event.

HYMAN COHEN et al., Plaintiffs, *v.* THE UNITED GARMENT WORKERS OF AMERICA et al., Defendants.

(Supreme Court, New York Special Term, September, 1901.)

Trades' union — Right to send out hostile circulars in a trade dispute — Injunction pendente lite.

Merchants will not be permitted to restrain garment workers from sending circulars to customers of the merchants, alleged to have seriously affected their business and likely to cause them irreparable damage, where the circulars are not shown to contain any threats or intimidation.

An injunction *pendente lite* will be refused where the relief afforded by it would be the same as if the plaintiffs succeeded at the trial, and their right to the relief sought is doubtful.

MOTION for an injunction.

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Franklin Bartlett, for plaintiffs.

Levy & Unger (Charles Haldane, of counsel), for defendants.

BLANCHARD, J. This is an application by plaintiffs to enjoin defendants, during the pendency of the action, from issuing certain circulars to plaintiffs' customers. It is claimed by plaintiffs that, by reason of the circulars sent to their customers, their business has been seriously affected, and irreparable damage will be done unless the continued use of such circulars be restrained. The defendants claim that in the distribution of such circulars no law is being violated by them, and their contention is not without an appearance of authority. It has been held by the Appellate Division of this department that the employees had the right to notify persons engaged in the trade of the controversies existing between them and their employers, and to request such persons not to deal with their employers unless such differences should be adjusted. Sinsheimer v. United Garment Workers, 77 Hun, 215, 217. In that case the court reversed the order of the Special Term granting an injunction *pendente lite*, stating that there was no satisfactory proof of any threats or intimidation. The plaintiffs in this case contend that the circulars do contain a threat and do intimidate the parties to whom they are sent. Circulars substantially similar in form were, however, held in the Sinsheimer case not to have amounted to a threat or intimidation or constitute "any infringement of any provision of law." It may be that the second circular complained of in the present case goes somewhat further in the direction of being objectionable, but I am not inclined to grant the injunction *pendente lite* when the action can be tried and the rights of the parties more satisfactorily disposed of at no very distant date. It is not the policy of the law to grant injunctive relief during the pendency of the action, where that relief would be the same as that ultimately granted if the plaintiffs succeeded at the trial, and the plaintiffs' right to the relief sought is involved in doubt. Hart v. Mayor, 9 Wend. 571, 581; McGuire v. Bloomingdale, 8 Misc. Rep. 478, 479. The motion is, therefore, denied, with ten dollars costs.

Motion denied, with ten dollars costs.

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FREDERICK A. RINGLER, Plaintiff, *v.* J. EDWARD JETTER, HENRY HACHEMEISTER, AND CAROLINE HACHEMEISTER, Individually and as Executors, etc., of CHRISTIAN HACHEMEISTER, Deceased, and ELIZABETH JETTER, Defendants.

(Supreme Court, New York Special Term, September, 1901.)

Specific performance of written contract for the transfer of stock — Plaintiff must move promptly and come into court with clean hands.

While courts of equity do not absolutely deny their power to compel specific performance of a contract for the transfer of stock, they will not exercise the power where the plaintiff does not come into court promptly and with clean hands, as is the case where it appears that he has slept on his rights for thirty-three months, that during that time the situation of affairs, so far as concerns the real defendant, has changed, and that the plaintiff finally moved only at the promptings and for the benefit of others, who had indemnified him against an unfavorable result of his action.

ACTION to compel specific performance.

James L. Bishop, R. F. Rabe and Edward Miehling, for plaintiff.

John M. Bowers, Samson Lachman and Theodore Baumeister, for defendant J. Edward Jetter.

R. S. Ransom, for defendant Caroline Hachemeister, individually and as executrix.

CLARKE, J. This is an action to compel the specific performance of a contract for the sale and transfer of 2,000 shares of the corporate stock of the George Ringler & Co. The brewing business of the corporation was formerly carried on by a copartnership, two members of which were George Ringler and Christian Hachemeister. George Ringler died June 4, 1889. Plaintiff was his brother and one of his executors. Shortly after the death of George Ringler a corporation was formed to carry on the busi-

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ness, with a capital stock of $600,000 and a bonded indebtedness of $400,000. Plaintiff was made president of this corporation and continued to occupy that position from June, 1889, to October, 1895, when he retired and transferred his stock. Christian Hachemeister died in 1896, and his last will and testament was duly probated April 2, 1896, wherein he appointed J. Edward Jetter, Henry Hachemeister and Caroline Hachemeister (his wife) executors, and whereby he bequeathed to his said wife the 2,000 shares of stock belonging to him at the time of his death, which shares were duly assigned and transferred by the executors to her. At the time of the execution of the contract at bar the entire capital stock of the company was held in the immediate families of George Ringler and Christian Hachemeister, both deceased. The defendant, J. Edward Jetter, married the daughter of Christian Hachemeister, and George J. Jetter, his brother, married the daughter of George Ringler. Mrs. Hachemeister, the widow, held 2,000 shares; Henry Hachemeister, her son, held 500 shares; William G. Ringler, son of George Ringler, held 1,500 shares; Rosa Jetter, daughter of George Ringler, in connection with her husband, George F. Jetter, held 1,500 shares, and Mrs. J. Edward Jetter, the daughter of Caroline Hachemeister, held 500 shares. It was a close family corporation. Its shares were not listed on any exchange and were not dealt in and were not to be obtained by the public at large, and, while intrinsically valuable, had no quotable or market value, as that term is understood in regard to shares which are so listed and dealt in. On May 20, 1897, Mrs. Caroline Hachemeister, who at that time felt aggrieved at the conduct of her children in the management of the brewery towards her and her interests, and the plaintiff, Frederick A. Ringler, executed a sealed instrument, under the terms of which, in consideration of the sum of $250, Mrs. Hachemeister gave to Mr. Ringler the option to purchase at any time within eight months from date thereof the said 2,000 shares of stock at the price of $100 per share, payable $5,000 upon delivery of the stock, and the balance, $195,000, in twenty notes, one payable each six months, and bearing interest at the rate of five per cent., and to be secured by deposit of the stock. The contract further provided that if Ringler should assign a half interest in said option to any other person, ten of the notes should be made by the party to whom such half interest should be assigned and indorsed by Ringler,

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and the other ten notes made by Ringler and indorsed by the other party. The $250 was thereupon paid by plaintiff's check to Mrs. Caroline Hachemeister's order and received, indorsed and banked by her. On the same day plaintiff and Mrs. Hachemeister's son, Henry, executed a sealed instrument, by which, after reciting the terms of the contract above set forth, and for the expressed consideration of $125, Ringler sold, assigned and transferred to Henry Hachemeister one-half interest in and to said option and all the rights, privileges and benefits thereunder, upon the expressed condition, however, that said Henry Hachemeister, whenever called upon so to do, should execute ten of the notes and indorse ten of the others, and bear and pay one-half of the cash to be paid under the provisions of the agreement. On the 6th of December, 1897, and before the expiration of said option, Mrs. Hachemeister transferred, by indorsement on the back of her certificate of stock, 1,000 shares to Henry Hachemeister and 1,000 shares to Elizabeth Jetter (wife of J. Edward Jetter), her son and daughter, and on the same day certificates were issued to each. On December 10, 1897, Mrs. Jetter transferred her certificate to her husband by indorsement, and the same day a certificate was issued to him. On the 12th of January, 1898, and a few days before the expiration of the option, plaintiff — Henry Hachemeister having refused to join, though requested, under his option — tendered to Mrs. Hachemeister the $5,000 in cash and his own notes for $195,000, as provided in the contract, and demanded performance on her part. Mrs. Hachemeister refused to accept the cash and notes, saying she had changed her mind; that she was about to bring suit against the executors; that she thought the stock had been sold too cheap, and she was not ready and willing to perform. Subsequently Mrs. Hachemeister brought an action to recover from her children the 2,000 shares of stock transferred on the 6th of December, 1897, upon the ground that no consideration had passed therefor and that she had been deceived, not intending to transfer, but merely to aid in getting the books straight. Said action came on for trial in March, 1899, and before its conclusion a settlement was made and the case discontinued. By the written terms of settlement, and upon substantial consideration, the title in the 2,000 shares of stock was confirmed in the children. October 30, 1900, plaintiff brought the suit at bar. It is quite evident that there has been painful and serious family

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discord in the management and control of this family concern, and that the stock of Mrs. Hachemeister, a simple-minded, elderly German woman, with a very limited knowledge of English and of business, has been the object of a fierce contention for control. Methods have been used on both sides which cannot meet the approval of the court. From the admission in the answer of Mrs. Hachemeister and the evidence, I find no ground for declaring the original contract or option of May 20, 1897, fraudulent. Although the price agreed upon, the time the option had to run, the amount paid and the failure to call in disinterested advice would of itself cause the court to hesitate in granting a decree for specific performance. While the general rule is for courts of equity not to entertain jurisdiction for a specific performance on the sale of stock, it is also true that cases of a peculiar stock may easily be supposed where courts of equity might still feel themselves bound to decree a specific performance, upon the ground that from its nature it has a peculiar value and is incapable of compensation by damages. Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365. This stock perhaps falls within the exception. But it appears that on the 8th day of December, 1897, Mrs. Hachemeister caused the $250 received by her to be returned to plaintiff, with the statement that she had settled her family differences, and that on the 12th of January, 1898, she refused to carry out her part of the contract of May 20, 1897. Plaintiff's right of action under the option then accrued. But he did nothing. Thereafter, as the result of the settlement of the suit brought by Mrs. Hachemeister, against her children, defendant Jetter became obligated to her for large and continuous payments during her life. This settlement was in March, 1899, and still the plaintiff did nothing. It was not until October, 1900, when there was an active contest in the management of the company for control, and upon receiving a bond of indemnity, which can be properly characterized as extraordinary, that this suit was brought. William G. Ringler, who had been president of the company, but who had been voted out of office and so lost his salary, and Henry Hachemeister, who, under the terms of the option, could have claimed 1,000 shares, and who, by the settlement made, had received 1,000 shares, and, therefore, whose own interests were the same whichever way the case went, executed an instrument under

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seal to this plaintiff, which, after setting forth the option and the fact of the commencement of this suit, proceeded: "Whereas it appears, under and in pursuance of an agreement, entered into between the said Frederick A. Ringler, Henry Hachemeister and William G. Ringler, before the commencement of this action, that the beneficial result of said suit will largely inure to the benefit of said Henry Hachemeister and William G. Ringler; and it further appearing that in the event of a successful determination of said suit said Frederick A. Ringler will be compelled to execute and deliver certain promissory notes as provided in said contract, and the said Frederick A. Ringler having signified his intention to proceed with said suit, provided he be indemnified and held harmless by said William G. Ringler and Henry Hachemeister against any claim arising out of said suit for attorney's fees, costs or damages of any kind; and whereas said William G. Ringler and Henry Hachemeister have agreed to co-operate with said Frederick A. Ringler in bringing said suit to a successful determination; Now, therefore, in consideration of the premises, etc., they hereby promise, covenant and agree that they will indemnify and hold him harmless from any claim, of whatever kind or nature, arising out of said suit; that they will carry out the agreement entered into between said Frederick A. Ringler and Henry Hachemeister, and that, in the event of a failure of said suit by reasons of matters of law, said Henry Hachemeister and William G. Ringler will pay all costs and damages arising out of said suit; and, further, that in the event of a failure on the part of said William G. Ringler and Henry Hachemeister to carry out the agreement entered into before the commencement of said action as herein referred to, said William G. Ringler and Henry Hachemeister will each pay to said Frederick A. Ringler as settled and liquidated damages the sum of $25,000, payable on demand." The moving cause for William G. Ringler's execution of that instrument was the promise of Frederick A. Ringler that if he succeeded in getting the shares sued for he would vote William G. Ringler back into the presidency, and the moving cause of Frederick A. Ringler's bringing this present suit was the receipt by him of that instrument and the negotiations leading up to it to secure the control of the management of the corporation. While courts of equity do not absolutely deny their power to compel specific performance of a contract for the transfer of stock, yet

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as in all equitable actions, plaintiff must be prompt — must come into court with clean hands — and to get equity must do equity. Under the facts of this case and familiar principles of equity jurisprudence, plaintiff having slept upon his rights from January 12, 1898, to October 30, 1900, having permitted without notice to or demand upon J. Edward Jetter, the real party defendant, material changes in the position of affairs, and having only moved at last under the promptings of others and for their "beneficial result" upon taking this astonishing bond of indemnity, he has no standing in this court, and whatever rights he may have under the sealed instrument alluded to, he must pursue in the proper *forum* against the maker thereof. He is hence dismissed, with costs. Settle decision on notice and submit suggestions as to allowance.

Complaint dismissed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* THE MERCANTILE CREDIT GUARANTY COMPANY OF NEW YORK, Defendant.

Matter of the Claims of CHASE, MERRITT & Co., EMERY & CRANE and THE CABLE RUBBER CO.

Matter of W. H. H. SMITH.

THE DANIEL FORBES Co., Plaintiff, *v.* JOHN M. BOWERS, as Receiver, etc., Defendant.

THE WINSTED HOSIERY Co., Plaintiff, *v.* SAME, Defendant.

(Supreme Court, New York Special Term, September, 1901.)

Credit insurance — "Gross sales" of insured how computed on insolvency of the insurer — Construction of a compromise clause — "Securities of such debtor" — Practice, where a rejected claim is approved and sent back by the Court of Appeals — Costs on reversal by that court of an order "with costs".

Where a corporation, insuring creditors against loss of the debts of their commercial debtors, becomes insolvent during the life of its policy providing that the loss of the insured is to be adjusted only so far as it exceeds a stated percentage of his gross sales — the mini-

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mum thereof being fixed at an arbitrary sum for the purposes of computation — this minimum must be adopted as the amount of the gross sales at the time the insurer became insolvent and, upon it as a basis, the insured may be allowed, in proceedings to dissolve the corporation, in such proportion as the term of the policy bears to the time which had elapsed after its issue and before the insurer became insolvent.

The policy provided, in substance, that it should be enforcible by the insured where his debtor made a general assignment or went into the hands of a receiver or, without failing in business, offered to compromise under a compromise approved by the insurer. A debtor in the hands of a receiver offered a compromise to the insured by giving notes on time but the offer was never accepted or executed, although the insurer agreed that any ultimate loss on the notes should be readjusted until Nov. 9, 1899, the maturity of the last note, under a clause which provided that where a debtor's offer of settlement had been deducted on an adjustment and the insured did not subsequently realize the amount of the offer, the loss should be readjusted provided the estate of the debtor was settled and the deficiency ascertained within twelve months from the expiration of the policy. The policy expired March 31, 1897. The deficiency was not ascertainable until 1899.

Held, that as the offer of compromise was never carried out nor made the basis of an adjustment there could be no readjustment under the clause providing therefor, and that the loss was to be computed under the clauses of the policy which governed cases of insolvency.

Under a clause of the policy declaring that, in estimating the loss of the insured upon a debt due him from an insolvent, "the securities of such debtor held by any one at the time of the appointment of such receiver, taken at their actual value, and the other assets of such debtor taken at the value as shown by his books * * * less twenty-five per cent., shall be deemed a payment to the extent of such value on account of the amount owing to the insured.", neither the lands of the debtor nor mortgages upon them are "securities of such debtor".

Where claims of creditors rejected by a referee in dissolution proceedings are taken to the Court of Appeals, are there allowed as to

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amount and are then sent back to him for a further hearing, the proper practice of the creditors is to enter orders establishing their claims against the funds in the hands of the receiver of the corporation, and it would be improper for them to enter judgments upon the remittitur.

An order of the Court of Appeals, reversing orders of the successive courts below, "with costs" covers costs in the Court of Appeals only.

HEARING upon exceptions to reports of a referee appointed to take proof and report upon claims against the defendant corporation.

Motions by Daniel Forbes Co., and Winsted Hosiery Co., for judgment upon remittitur.

Nicoll, Anable & Lindsay, for receiver.

Raphael J. Moses, for claimants.

GIEGERICH, J. The defendant corporation, engaged in the business of credit insurance, issued its policies of insurance against loss sustained by reason of the insolvency of debtors to whom the insured had extended credit for goods sold in the usual course of business.

The present proceedings, in the action brought for dissolution of the corporation, involve the validity and amount of claims presented by certain policyholders against assets in the hands of the receiver, and, by the exceptions taken, the conclusions of the referee are assailed in some particulars in behalf of the receiver, and in others in behalf of the claimants.

It has been contended for the receiver that these policies are invalid, if tested by the law of Massachusetts, and that they are to be treated as contracts made or to be performed within that State; hence that they are unenforceable as the basis of claims in this action.

Upon this point the reasoning of the learned referee, favoring the view that their contracts were made and to be performed in this State, is found to be persuasive. The intention of the parties was clearly to make a contract under conditions which would render it valid, in each instance, it being apparent from the trans-

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actions that the form of a Massachusetts contract was sought to be avoided, and that the parties actually knew of the state of the law.

The authorities cited by the referee sustain the conclusion that the contracts may, as matter of law, be treated as contracts made and to be performed within the State of New York, and I find no necessity for further discussion of the point.

The exceptions of the claimant, Chase, Merritt & Co., bring in question the accuracy of the finding as to the amount of its claims under the policy, the dispute being as to the proper effect to be given to a provision of a policy whereby the loss was to be adjusted only so far as it exceeded a stated percentage of the gross sales made by the insured, the minimum of the gross sales being fixed at an arbitrary sum for the purposes of the computation.

Owing to the insolvency of the company within the period of insurance and the consequent impossibility of performance of the contract for the full period, it would be manifestly inequitable to measure the rights of the insured as upon this arbitrary amount of "gross sales" which was fixed with a view to sales made during the full term of the policy.

There is no dispute that the referee properly refused to take this total arbitrary amount as representing the gross sales for the purpose of computing the loss as determined over the agreed percentage of gross sales, and the question is whether the method adopted by him for an equitable adjustment of the loss, with a view to the business of the insured up to the time of the failure of the insurance company, is the proper method.

Since the insured was to be indemnified only so far as his losses exceeded a certain percentage of his gross sales, and the failure of the company had brought the matter to a close, leaving the rights of the insured to be adjusted as of the date of the failure, there is naturally some uncertainty whether the gross sales (for the purpose of computation) could fairly be measured by the actual sales to that date, for it might be that the sales afterward would have been in increased or lessened proportion, and the loss payable to the insured would have been correspondingly affected.

I am inclined to agree with the referee that the "gross sales" may best be taken by resorting to the agreed minimum of such sales, as expressed in the policy, and accepting the fraction of that

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amount afforded by the proportion of time during which the policy was in life, taken in relation to the full term of the policy.

There is possibly some doubt whether the insured's opportunities for trade were equal from day to day, but the fairest adjustment would seem to be that taken on the basis of the agreed minimum sales, a basis which the parties presumably took to be representative of the business conditions under which the insurance was effected, and no method is suggested which would result in better equity, so far as I have been able to find.

Passing to the claim of W. H. H. Smith & Co., the dispute as to the amount of loss payable under the policy turns upon the extent to which the insured is entitled to indemnity upon a debt of $2,556.87 due from the Toledo Lumber & Manufacturing Company.

It appears that the debtor became insolvent and a receiver of its assets was appointed. Subsequently a proposal was made looking to the full payment of its debts, in the carrying out of which proposal this creditor was to receive four promissory notes maturing at successive dates.

By the terms of the policy, it became enforceable where the debtor of the insured had made a general assignment "or the said debtor, without failing in business has offered to compromise his debts and said compromise was first submitted to and approved by this company." The meaning of the term "general assignment" was elsewhere in the policy defined as including a receivership, and the method of adjusting losses where a receiver of the debtor had been appointed was expressly detailed.

The contention of the claimant is that the amount of this debt became payable in full as a loss under the policy, without regard to the provisions for the adjustment of losses in the case of an insolvent debtor, and that, in any event, the referee erred in his construction of those provisions, if they were applicable.

According to the evidence, this claimant, when notified of the debtor's proposal to give promissory notes in payment of the debt, wrote to the insurance company, stating the offer and inquiring, "will you guarantee the payment of any loss on this proposition after the expiration of our policy, under the readjusting clause?" To which the company answered, "we will, as requested, extend the condition of readjusting clause until November 9th, 1899, to cover the maturity of the last note."

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The readjusting clause provided, "when an amount offered in settlement by a debtor has been deducted in an adjustment of losses under this policy, and thereafter the insured does not realize from the estate of said debtor, or otherwise, sufficient to pay the offer or settlement so deducted, said amount shall be readjusted in the same manner as though such offer or settlement had not been made, provided, however, that at the time of adjustment of said losses, the said offer or settlement was noted in writing on the final proof by this company and the insured, but no such readjustment shall be made unless the estate of such debtor has been finally closed and settled and the deficiency ascertained within twelve months from the expiration of this policy."

The policy expired March 31, 1897; therefore, without an extension, this clause could not have covered a readjustment on the basis of a deficiency which was not ascertainable until 1899, and no reason is apparent for giving to the correspondence above quoted any greater effect than the granting of a request to extend the time during which this clause was operative.

There had been no actual compromise and this offer of compromise was at no time used as the basis of any adjustment of the loss. Had there been an adjustment, then a readjustment might have followed, but, as the matter stands, the readjustment clause appears to have nothing to do with the case.

The correspondence did not alter the policy in any way other than as to the time for readjustment, and, since the offer of compromise was never accepted nor concluded, and the debtor had failed in business, the matter was not one for adjustment as in a case where "the debtor, without failing in business" had offered a compromise, with the approval of the company.

The loss, therefore, was properly to be computed in accordance with the provisions of the policy governing cases of insolvency, and the next question is whether the referee's method of adjusting the loss is correct.

According to the policy, in estimating the loss sustained by the insured upon a debt due from an insolvent "the securities of such debtor held by any one at the time of the appointment of such receiver, taken at their actual value, and the other assets of such debtor taken at the value as shown by his books * * * less twenty-five per cent., shall be deemed a payment to the extent of such value on account of the amount owing to the insured."

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It appears that certain of the assets of this debtor, the Toledo Company, consisted of pieces of real estate upon which were outstanding mortgages, and the contention of the insured is that these mortgages were "securities" of the debtor within the meaning of the policy.

The referee has found that the actual value of the real estate was in a stated sum considerably below the value as appearing upon the debtor's books, and if the actual value is taken as the basis for computation, the insured would be entitled to some payment upon the loss; otherwise the finding of the referee that nothing is due under the policy is to be supported.

I think that the referee is correct in his conclusions that the real estate and the mortgages thereon should not be classed as "securities of the debtor."

The property of the debtor is divided into two classes "securities" and "other assets," and the securities referred to are evidently such as have the character of assets, for it is only as assets that the "securities" enter into the scheme of computation.

In the sense of assets, these mortgages are certainly not "securities of the debtor," and the real estate upon which they are liens and the title to which is in the debtor, does not partake of the nature of "securities" as the term is naturally understood.

For the purposes of the present question, the nature of the real estate, as an asset of the debtor, is the same whether it is encumbered or not — that is, it is no more of the class of "securities of the debtor" because of the presence or absence of mortgages — and the use of language in the policy, viz.: "The securities of such debtor held by any one," etc., would seem to forbid any such construction as would include the debtor's real estate. Indeed, if the real estate were to be classed as "securities" the provisions of the policy relating to "other assets" would be meaningless, for all assets would be equally "securities," in so far as they might be susceptible of employment as security for a debt.

The exceptions of the Cable Rubber Company relate to the referee's deduction of certain items in estimating the loss under the policy, the ground of the deduction being that these items were chattel mortgages (or in one instance a trust deed), and not within the policy. It appears to be conceded that these items are of the same nature as those passed upon in the Winsted Hosiery Company's claim, and the exceptions of the Cable Rubber

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Company must, therefore, be sustained, in accordance with the conclusion lately expressed by the Court of Appeals that items of this character are within the policy. People v. Mercantile Credit Guarantee Co., 166 N. Y. 416.

The motions for judgment upon the claims of the Daniel Forbes Company and the Winsted Hosiery Company are opposed upon the ground that the proper practice calls for an order, not a judgment. This I take to be the correct view. The decision of the Court of Appeals settled the question as to the amount of these claims and the matter was remanded to the Special Term for further hearing. As the result of such hearing the claims are to be allowed, but the form which the direction of the court is to take is necessarily the same as upon the original hearing.

The action has not gone to judgment, and claims allowed in the course of these proceedings are payable by the receiver, when so directed, in due course of administration, but this payment is not to be enforced by execution and the rights of the respective claimants are properly preserved by an order establishing the claims as against the appropriate funds in the receiver's hands.

Upon the question of costs, it appears that the Court of Appeals reversed the orders of the Appellate Division and Special Term "with costs," and this covered costs in the Court of Appeals only. Matter of Water Commissioners, 104 N. Y. 677. The argument for the claimants in support of the propriety of an award to them of costs in all courts has to do with a question which was presumably considered by the Court of Appeals, but the present application, so far as it relates to costs of earlier steps in the proceedings, cannot be favorably considered because beyond the power of the Special Term. Matter of Prot. E. Pub. School, 86 N. Y. 396. The moving parties may have motion costs, but since their costs in the Court of Appeals have heretofore been made the subject of a judgment, the orders to be entered can contain no further award of costs.

Exceptions of Receiver, Chase, Merritt & Co. and W. H. H. Smith overruled. Exceptions of Cable Rubber Company sustained and report modified accordingly.

Ordered accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* J. OVERTON PAINE, Defendant.

(Supreme Court, New York Special Term, September, 1901.)

Larceny — Insufficient complaint against a stock broker for appropriating a customer's margin — Penal Code, § 528.

Larceny is not established by a complaint alleging that the complainant, having money on deposit with the defendant, a stock broker, to be used as a margin for speculation, received notice from the broker that he had sold for him certain shares of stock at certain figures, that no transactions were to be made by the broker for the complainant except upon his orders, that he gave no orders to sell, that the stocks were in fact not sold, and that the broker reported the sale in order to show a loss of margin and appropriate to his own use the complainant's deposit.

The complaint shows that the complainant parted with his money voluntarily and does not show that he had even demanded it back.

The fact that the broker made misstatements as to sales does not constitute a crime, for the complainant parted with nothing on the faith thereof, did not alter his position, and was not thereby deceived to his pecuniary injury.

HEARING upon writ of habeas corpus.

E. A. Philbin, District Attorney, and John F. Cowan, for People.

Black, Olcott, Gruber & Bonynge, for defendant.

MCADAM, J. The complaint charges that on May 6, 1901, Maurice A. Thorner, the complainant, had on deposit with J. Overton Paine, the defendant, the sum of $167 to be used as a margin in speculating in stocks for the complainant's account; that on said date the complainant received notice from the defendant that he had sold ten shares of Northern Pacific and twenty shares of Brooklyn Rapid Transit stock at certain figures; that no

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sales or purchases of stock were to be made for complainant except upon his direction; that the complainant gave no orders for the sale of said stock, and that the same was not, in fact, sold; and that the statement made by the defendant to the effect that he had sold said stock was to show a loss of the margin and to appropriate to his own use the money deposited by the complainant as aforesaid. Clearly no crime is alleged. The defendant did not obtain possession of the complainant's money by any trick, device, fraud or artifice, for it was voluntarily parted with by the complainant of his own free will and accord, in which respect the case differs essentially from that of the Commonwealth v. Cooper (130 Mass., 285), relied on by the district attorney. In that case the complainant, at the request of the defendant, who was a broker, gave him $200 as margin to use on the purchase of 100 shares of the stock of a certain railroad, the defendant agreeing at the time to make the purchase and receiving the money for the specific purpose. The broker afterwards represented that he had made the purchase as agreed, but, when pressed for the stock by the customer with an offer of the balance of the purchase money, admitted that he had misappropriated the money and applied it to his own use. The court instructed the jury that the defendant, having obtained the money to be applied to a particular purchase and then fraudulently and deceitfully applied it to his own use, was guilty of embezzlement under the laws of that State. The conviction was affirmed, the court holding that "even though the property was intrusted to the broker for an illegal purpose it was no defense to an indictment for embezzlement." Citing Commonwealth v. Smith, 129 Mass., 104. In New York the former crimes of embezzlement and false pretenses are now embraced within the term larceny as defined by section 528 of the Penal Code. In the present instance, the $167 placed in the hands of the defendant by the complainant made him the debtor of the latter to that amount and gave the depositor the right to recover by civil action a return of the deposit or to call upon the defendant for an accounting. The fact that the defendant, after he had the money in his possession, made misstatements as to alleged purchases or sales does not constitute a crime, for the complainant parted with nothing on the faith thereof, did not alter his position in consequence, and was not in any manner deceived to his pecuniary injury. It is not charged, nor can it be inferred from any

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allegation of the complaint, that the $167 deposited with the defendant paid for or was to pay for ten shares of Northern Pacific and twenty shares of Brooklyn Rapid Transit stock, so as to make the complainant the owner thereof or the defendant a bailee with respect thereto, or that any possible wrong regarding any such stock was done to the complainant. No demand and refusal to pay or deliver over are alleged. Breach of contract is actionable — not indictable — but even a breach, the foundation of every civil action, is not pleaded. Every essential to a criminal offense should be set forth with particularity (Barb. Crim. L. [2d ed.] 519, 520), and not left to inference, which favors innocence and never lends its aid to establish guilt unless the facts charged unerringly point that way. Tested by the settled rules of criminal procedure, the complaint here is so inartistically drawn that it may well be termed a nondescript. The complaint fails to set forth any charge of which a criminal court has jurisdiction, and the attempt to make a criminal offense of the transaction looks like an effort to use the criminal courts as a means of enforcing an obligation the remedies respecting which belong exclusively to the civil courts established for the purpose. For these reasons the magistrate had no authority to commit the defendant to await the action of the grand jury, but should have discharged him at once. As the defendant is unlawfully deprived of his liberty, the writ must be sustained and the defendant discharged from further restraint.

Writ sustained and defendant discharged.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* FREDERICK B. RUSSELL et al., Defendants.

(Supreme Court, New York Special Term, September, 1901.)

Bail bond — Not void for failure to recite offense correctly — Waiver and estoppel — Code Crim. Pro., § 684.

A bail bond, given at a police station, is not rendered invalid by the fact that it inaccurately or inadequately recites the offense for which the principal is held, e. g., that he is charged as a "Sus. Person" (suspicious person), an offense not known to our penal statutes, by that term at least.

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Where, therefore, the complainant appears in the magistrate's court on the day specified in the bond and there charges the principal with the statutory crime of extortion, neither he nor his surety can, because of such recital in the bond, procure vacation of a judgment entered on its subsequent forfeiture, as, by voluntarily giving it, they have admitted the magistrate's authority and the regularity of the proceedings, and are also estopped from questioning either.

MOTION by defendants to vacate judgment and execution.

William G. Cooke, for motion.

Eugene A. Philbin, District Attorney, for People.

MCADAM, J. The defendants, principal and surety on a bail bond given at the Eighteenth Precinct Police Station House, claim that because it recites that the principal is held to answer the complaint of "Sus. Person" (an offense unknown to the law), the bond is void, and hence a judgment entered on a forfeiture thereof and an execution to collect the same must be vacated on their application. The claim is based on the argument that the principal was in custody upon a charge of what under the law was no offense at all, and that the arrest and detention were not only wrongful, but the whole proceeding void *ab origine*. That the abbreviated term used indicates no offense in law is not so plain. Where there is reasonable cause to believe that a person has committed a felony he may be arrested without a warrant. Code Crim. Pro., § 177. Yet the belief is generally nothing more than a well-grounded suspicion. Such a person is, therefore, regarded in police parlance as a "suspicious person," the designation aptly denoting the offense. The condition of the bond was not only to produce the prisoner before the magistrate on the following day, but he was to there "remain to answer, subject to any order of the magistrate and render himself in execution thereof." The complainant appeared in court on August twentieth, the day specified in the bond, and charged the prisoner with extortion, a crime which may be either felony or misdemeanor, according to circumstances. Penal Code, §§ 552, 557. If the defendant had been in actual custody the proper officer would have produced him to answer this charge, and the object of the bail bond is to put the

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prisoner as much under the power of the court as the officer whose place the sureties take would have done if the bond had not been given. It was formerly held that the recognizance should so far state the crime charged as to show the case to be one over which the officer taking it had jurisdiction. People v. Koeber, 7 Hill, 39; People v. Young, id. 44. But subsequently, in People v. Kane, 4 Den. 530, it was held by the same court that the recognizance need not recite the special facts which gave the officer jurisdiction, and the cases above cited were in this respect overruled. In Champlain v. People, 2 N. Y. 82, the rule laid down in People v. Kane, *supra,* was adopted by the Court of Appeals, and has ever since been the settled law of the State. Gildersleeve v. People, 10 Barb. 35. The reason of the rule is that, the entering into a recognizance being the voluntary act of the party, he admits the authority of the magistrate and acknowledges the regularity of the proceedings in which it is taken. In this respect the case is distinguishable from one where the liability arises from a proceeding in *invitum.* Gildersleeve v. People, *supra.* The inaccurate or inadequate recital of the offense in the bond in no manner affects its validity. The Code of Criminal Procedure (§ 684) provides that "Neither a departure from the form or mode prescribed by this Code in respect to any pleadings or proceedings, nor an error or mistake therein, renders it invalid, unless it have actually prejudiced the defendant, or tend to his prejudice in respect to a substantial right." No substantial or other right of the defendants has been prejudiced in this instance. Acting on this provision, the court in People v. Gillman, 125 N. Y. 372, held that the omission to recite in the bail bond the offense charged did not prejudice the defendant, that the recital is not the essence of the undertaking of bail, and that the defendant discharged on bail may be tried upon any other charge subsequently made. Besides, on every equitable principle, the bond has obtained for the defendants all the benefit that could be derived from the suretyship, and they should now be estopped from setting up its invalidity. Kelly v. McCormick, 28 N. Y. 323; Chamberlain v. Appelgate, 2 Hun, 510; Bates v. Merrick, id. 571. It follows that the defendants' motion to vacate the judgment and execution must be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

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CHARLES H. A. GRANT, Plaintiff, *v.* GEORGE S. BIRRELL, Defendant.

(Supreme Court, New York Trial Term, September, 1901.)

Jurisdiction — Existence and jurisdiction of foreign court how proved and when judicially noticed without proof — Waiver of lack of jurisdiction of the person — Code C. P., § 942.

The jurisdiction of the High Court of Justice of the Province of Ontario of the Dominion of Canada, a court of original jurisdiction, is sufficiently proved where a book, purporting to be the last revision of the statutes of the Legislature of the Province and containing the Judicature Act establishing the jurisdiction of its High Court, is given in evidence and identified by one, who had been a solicitor and practitioner in that Province, as issued officially by the Queen's printer.

The Supreme Court of the State of New York may take judicial notice of the existence and jurisdiction of the said High Court.

Where a resident of the State of New York, served within it with a writ of said High Court, appears in said court by solicitors who, in the same instrument, expressly object to the jurisdiction, and thereafter serves a general denial to a statement of claim served upon his demand therefor, and also interposes an affirmative defense raising the question of jurisdiction, he has, by his acts of voluntary appearance and by his answer, waived general jurisdiction of his person, and therefore cannot raise that contention in order to defeat an action subsequently brought in our courts upon a judgment rendered against him by a justice of the said High Court, after a trial had on the merits in the action brought in that court.

ACTION to recover upon a Canada judgment.

Henry Brill, for plaintiff.

Albert Zimmermann (David Gerber, of counsel), for defendant.

RUSSELL, J. The plaintiff seeks to recover upon a Canada judgment. The defendant claims a want of jurisdiction of the

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Canadian court, both of the subject matter and the person of the defendant. The Canadian record, given in evidence, shows the original writ to have been issued the 27th of August, 1895, at London in the Province of Ontario, Dominion of Canada, and was in its body directed to George S. Birrell of the city of New York. It is indorsed upon its return as follows: "Within writ was served by me, George Morehead, on George S. Birrell the defendant, on Thursday the 5th day of September, 1895. Indorsed the 5th day of September, 1895. George Morehead, 403 Greenwich street, New York city, N. Y." The next paper of the record is entitled in the action and reads as follows: "Enter an appearance for the defendant George S. Birrell in this action subject to defendant's objection to the jurisdiction of this honorable court to entertain this action, which defendant raises in the pleadings by order. Dated the 23d day of September, A. D., 1895, Gibbons, McNab & Mulkern, defendant's solicitors, London. The said defendant requires a statement of claim to be delivered." The statement of claim follows and is similar in substance to our form of complaint. It avers the payment for the defendant of $1,382.85 as the cost of an unsuccessful litigation in the High Court of Justice for Ontario. The next paper on the record is a statement of defense which contains a general denial, an affirmative defense, an averment that the defendant was a resident of the city of New York, and that the contract set forth in the statement of claims was outside the jurisdiction of the court. The last paper in the pleadings was a general joinder of issue by the plaintiff upon the statement of defense. The final proceeding, as appeared by the record, is the judgment given the 20th of March, 1897, which recites that the action had been tried before Mr. Justice Armour, that he ordered judgment be entered for the plaintiff for $1,382.85 and interest, and adjudged that the plaintiff recover from the defendant $1,567.75, with $180.56 costs.

The defendant urges that the existence of the High Court of Justice of Ontario must be proven as a fact, and also that its legal authority derived from the Legislature of the Province of Ontario to exist and act as a Court of Justice, with the scope of its jurisdiction statutorily defined, must be shown by the proper legislative enactments, and that such evidence has not been given in this case. A book appearing and purporting to be the last revision of

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the Statutes of the Legislature of the Province of Ontario was given in evidence and identified by a witness, who had been solicitor in that Province and practicing as such, as issued officially from the Queen's printer. I think the apparent authority for the issuing of the book, contained within itself, and the testimony of Solicitor Cooper, sufficient to authenticate the exhibit as evidence of the enactment by the Legislature of Ontario of the Judicature Act contained in the Revised Statutes establishing the jurisdiction of the High Court of Justice. Code Civ. Pro., § 942; Hecla Powder Co. v. Sigua Iron Co., 157 N. Y. 437.

But were there technical objection to this proof as inadequate for the purpose, are the eyes of justice so blinded that the court of original general jurisdiction in the State of New York cannot see the existence of a similar court of a friendly power exercising its jurisdiction in a land divided from this State by a merely mathematical line? No hint is given by the defense that this court may not recognize the fact that there is a Dominion of Canada and a Province of Ontario within it, which Dominion and Province are supplied with usual governmental agencies. This court must presume that methods for the administration of justice surely prevail in that Dominion and Province, and that some court of general jurisdiction exercises the usual power to determine legal controversies. Is it a step beyond the vision of our own court to see the name of that other court, evidence being given that the court of original jurisdiction in Canada, which sits for the hearing of controversies, so acts under the name of the High Court of Justice? Would it not be humiliating to acknowledge that our judiciary, the members of which have known from childhood the existence in England and its dependencies of the Kings Bench and Chancery division, should not be supposed to know as judges, with the added wealth of knowledge from years of advocacy and judicial investigation, that there were in reality such courts, and that, in following the example of the wise legislation of the State of New York, the Parliament of England had combined law and equity proceedings in one forum, which reform extended also in fact and in provincial legislation to our neighbors at the North, who form an integral part of the British empire?

A few pertinent authorities on this subject are referred to. We recognize judicially the existence of the different foreign States and their seals. Schoerken v. Swift, 19 Blatchf. 209.

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Also the organization of the forms of government of the Dominion of Canada. Calhoun v. Ross, 60 Ill. App. 309.

We can take notice of the names and functions of those courts of other nations which exist for the establishment and protection of ordinary rights. Dozier v. Joyce, 8 Port. (Ala.) 303.

The public acts and proclamations of the Spanish and French governments while holding the territory of Louisiana may be judicially recognized. United States v. Reynes, 9 How. (U. S.) 127.

Reference to the public documents in Florida before it was annexed to the United States may be judicially had without their being given in evidence. Coffee v. Groover, 123 U. S. 1.

Special and peculiar creations by governmental power for the enforcement by judicial authority of unusual proceedings against individuals, or to establish the status of property, may well be beyond the ken of judicial recognition in other countries except so far as proper proof brings their power and action within the presumptions accorded to judicial action. It is only necessary here to recognize the certainty that a court of ordinary general jurisdiction must exist in the Province of Ontario, and that a court which acts with the usual adjuncts pertaining to such a tribunal may be identified by the name it bears. There is, therefore, no merit, either upon the proof or judicial presumption, in the objection that the general power of the High Court of Justice of Ontario, Canada, has not been sufficiently established.

But the defendant also says that no jurisdiction was ever gained by the Canadian court of his person. Beyond doubt the service of an original precept to institute an action, which might thereafter be prosecuted to a hostile judgment, cannot be served without the jurisdiction of the court from which it issued so as to bind the defendant beyond the territory in which that writ may have some effective power, solely by operation of legislation which is binding within the territorial jurisdiction of the Legislature. Hence the defendant here need have paid no attention to the service upon him in the city of New York, and a judgment upon such service, even if the Canadian court was willing to enter one, could have had no effect beyond the Province of Ontario. If that service might endanger any property of the defendant within the Province of Ontario, he had his election to defend or leave that property to be disposed of under the power of the courts

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which are rightfully presumed to administer justice, and which had jurisdiction of such property as he left behind within their jurisdiction. In the courts of our own State no judgment can be entered without personal service of the summons or personal appearance of the defendant, unless proof is made of the presence of property within the State which execution may reach.

But the defendant made his election to willingly enter the controversy to which he was invited in the court of Canada. He knew that success upon the merits, after a trial there, would forever bar his antagonist from further litigation against him upon that cause of action. The case was duly tried, and the claim of the plaintiff against the defendant established in the former's favor, presumably after a fair trial. Choosing, as he did, the course he was to pursue, can defendant now say that he is more favorably placed than his antagonist in that the judgment is no bar against him while a contrary decision would have released him forever? Can the defendant make a general appearance for the purpose of a broad contest upon the merits and still reserve the right to insist that he was not properly brought within the forum of the contention,— a right to be exercised only in case of defeat upon the merits? Such a privilege would be unjust to the court as well as the suitor. It is not the law. Submission of the merits to the adjudication by the court is also a submission to the conseqences and conclusions that follow the judgment of the court which judgment the defendant has willingly invited.

A defendant who voluntarily appears and answers, though the answer in terms reserves the right to object to the jurisdiction of the court, is precluded from objecting that the court did not acquire jurisdiction of his person. Mahaney v. Penman, Hoffman, J. (concurred in by Oakley, Ch. J., and Duer, J.), 4 Duer, 603.

A notice of appearance after a denial of a motion to set aside service of a summons upon a defendant who was served while a witness gives the court general jurisdiction of the person. Woodruff v. Austin, 16 Misc. Rep. 543.

A general appearance gives jurisdiction even where there was no property in the State and defendant was served only by publication. Reed v. Chilson, 142 N. Y. 152; Christal v. Kelly, 88 id. 286.

It is not necessary to consider here the question which so vexed the Supreme Court of the United States in Hilton v. Guyot, 159

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U. S. 113, how fully the defendant must plead in an action within this State, or the extent of the proof he must give, to show that the judgment record of the foreign jurisdiction should be opened for investigation here on account of fraud or gross partiality, because this defendant did not upon this trial challenge in any form an investigation into the merits of the claim merged in the Canada judgment.

The expression in the statement of defense, that an order was made allowing the defendant to enter an appearance without prejudice to his right to object to the jurisdiction of the court, is not sustained by any proof of an order allowing him to answer and contest upon the merits without subjection of his person to the usual power of the court. The presumption would rather be, if there was any order in the terms referred to by the answer, that as to the person the defendant was willing to submit to the decrees of the court, but that he wished to preserve any objection to its general jurisdiction.

Judgment is directed in favor of the plaintiff for the amount claimed and costs.

Judgment for plaintiff, with costs.

MARY V. FINNEGAN, Plaintiff, *v.* WILLIAM A. HALL, Defendant.

(Supreme Court, St. Lawrence Special Term, September, 1901.)

Bankruptcy — When a discharge releases a judgment for the bankrupt's breach of promise of marriage — His intent in going into bankruptcy immaterial.

A discharge in bankruptcy releases a judgment rendered against the bankrupt for breach of promise of marriage where there was no accompanying seduction nor proof of malice tending to show an attempted injury to character, as, in such case, there is a mere contract debt of record and "no willful and malicious injuries to the person", within the Bankruptcy Act of 1898, § 17, subd. 2.

The fact that the bankrupt went into bankruptcy in order to avoid that particular judgment cannot limit the legal effect of his discharge.

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MOTION to cancel a judgment.

Luther E. Wadleigh, for plaintiff.

R. E. Heffernan, for defendant.

RUSSELL, J. A motion is made to cancel a judgment of this court in favor of the plaintiff for $1,091.21 entered May 7, 1900, upon the ground that a discharge in bankruptcy by the United States District Court was given to the defendant on the 17th day of July, 1900. This motion is resisted upon an affidavit of the plaintiff that the cause of action was for breach of promise of marriage, and that the defendant went into bankruptcy only for the purpose of evading the payment of this judgment.

By the Act of Congress of July 1, 1898, section 17, a discharge in bankruptcy releases the bankrupt from all provable debts except as specified. The exception relied upon by the plaintiff here is contained in paragraph 2 of the section, which reads as follows: "judgments in actions for frauds, or obtaining property by false pretences or false representations, or for willful and malicious injuries to the person or property of another."

An action for breach of promise of marriage has always been recognized as one of assumpsit, although from its peculiar character the damages recoverable may be widened by proof of malice tending to show an attempted injury to character or a treacherous violation of confidence and wrongful use of the influence gained by the promise to marry by which seduction is accomplished. Thorn v. Knapp, 42 N. Y. 474.

The law wisely recognizes the weightier injury affecting the life, happiness and standing of a woman of good character as the more essential wrong and a mere refusal to marry as of minor importance. In dealing with the rights of person or property the substance of the injury should always overcome the mere form of the action. Hence it has been held that seduction and birth of a child presented a case of such willful injury to the person that a discharge in bankruptcy could not efface that injury. Dickey, J., Kings Sp. Term, Disler v. McCauley, 35 Misc. Rep. 411.

So also a judgment for criminal conversation is not discharged. Gildersleeve, J., New York Special Term, Colwell v. Tinker, 35 Misc. Rep. 330.

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Where, however, none of the graver elements enter into the consideration of the action its character is that of a breach of simple contract. Any incidental injury not affecting the person or character of the plaintiff does not bring the judgment within the excepted class. Burnham v. Pidcock, 58 App. Div. 273.

It has been held in the Federal Court in the case of a judgment for breach of promise to marry, even though accompanied by seduction, that the discharge is valid. Matter of McCauley, 101 Fed. Rep. 223, Thomas, J.

As a matter of course every bankrupt applying for a discharge from his obligations does so for the purpose of evading their payment. Whether that motive be good or bad, Congress has within its legitimate power given to the bankrupt the right to pursue that motive into execution and obtain his discharge. The motion is accordingly granted.

Motion granted.

THE PEOPLE ex rel. JOHN W. KELLER, Commissioner of Public Charities, Respondent, *v.* JESSE W. POWERS, JR., Appellant.

(Court of General Sessions of the Peace in and for the County of New York, September, 1901.)

Disorderly person — Evidence in one criminal proceeding cannot support the judgment in another — Code Crim. Pro., §§ 900, 901.

Where a wife charges and proves her husband to be a disorderly person in having failed to support her, evidence that he had not supported their child is incompetent in that proceeding, and therefore the magistrate's conviction of the husband on both charges is erroneous, and without evidence, in so far as it convicts him of the distinct offense of having failed to support the child.

The fact that on the adjourned day, when the magistrate made decision, a complaint was made by the wife against the husband for his having failed to support the child, cannot support the conviction for that offense, as every criminal proceeding must be complete in itself, and the evidence in one such proceeding cannot be used to support, or be "competent testimony" (Code Crim. Pro., § 901) to support, the judgment in another.

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APPEALS by the defendant from orders convicting him as a disorderly person for abandonment of his wife and for abandonment of his child.

William Henry Knox, for appellant.

John Whalen, Corporation Counsel, for respondent.

GOFF, R. There were two orders made by the magistrate, each adjudging defendant a disorderly person, one for abandonment of his wife and one for abandonment of his child. From each of those orders the defendant appeals, and they will be considered separately.

It appears that the defendant and his wife were married on the 15th of December, 1892. One child, Catherine Hurd Powers, was born to them. On the 9th of June, 1894, for causes of marital displeasure, they separated and lived apart. Subsequently and on the 7th of September, 1894, and while they were living apart, they, by the intervention of a trustee, executed an agreement which provided, among other things, that the husband should surrender to the wife the care and keeping of the child, that he should pay her a certain sum per month for her support and maintenance during her life and for the support and maintenance of the child until she became four years of age, and that the wife should accept the provisions named in lieu of other claim for her support during her life. The trustee agreed to indemnify and save harmless the husband from every liability for support of the wife during her life. Under this agreement payments were made for some time by the husband.

On the 21st of February, 1898, the wife commenced an action in the Supreme Court for a separation from bed and board, on the ground of abandonment. Issue was joined by the husband. A motion was made for alimony and counsel fee, and the court at Special Term, awarded the plaintiff certain alimony *pendente lite* and counsel fee. From this order the defendant appealed to the Appellate Division, which reversed the order, and in its opinion, by Van Brunt, P. J., said: "This action is brought to procure a decree of separation on the ground of abandonment. It appears that shortly after the separation of the parties they entered into a formal agreement whereby the parties mutually agreed to live separate and apart (referring to the agreement) * * *.

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It is difficult to see how this action can be maintained under these circumstances. Where the wife consents to the separation there is no abandonment. It is only where the husband deserts the wife without her consent and refuses to give her adequate and proper support, that an action for abandonment will lie. In the case at bar the parties have agreed to live apart, and, consequently the separation is with the consent of the plaintiff and apparently is in accordance with her wishes. There can be no abandonment under such circumstances." Powers v. Powers, 33 App. Div. 126.

The learned counsel of the defendant takes the ground that this decision fixes the *status* of the complaining wife and the defendant, as far as their marital relations are concerned, that the defendant could not have abandoned his wife, and that consequently the order of conviction appealed from cannot be sustained. That such being the case, and on the law laid down by the Appellate Division, it is incumbent upon me to reverse the conviction of the defendant for the abandonment of his wife.

It is urged by counsel for respondent, and with apparent justification, that whatever conditions may interpose to protect the defendant in these proceedings from conviction for abandonment of his wife, no reason, legal or otherwise, can be adduced for failure to support his child. The magistrate, when pronouncing judgment, very aptly said: "It cannot be seriously claimed that the defendant should not support his child, placed in the care and custody of the mother by him, nor will the agreement made between the complainant and the defendant release him from his parental obligation for the support of his child."

This order ought to be sustained unless there be some substantial defect in the proceedings which constitutes legal error.

From the return of the magistrate it appears that on the 29th of March, 1901, Carrie L. Powers made sworn complaint that her husband had abandoned her. (It will be noted that he is not charged with having abandoned his child.) On this complaint a warrant was issued and defendant was arrested. On April second an examination on this complaint was had. The testimony related exclusively to the charge of abandonment of the wife, except: "Q. Has he supported this child in any way? A. Not a penny." There was some testimony given by Mr. Knox, the attorney, relating to the child, which was unimportant. On April fifth the examination of witnesses was concluded.

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On April twenty-fourth a complaint was made by the wife that the defendant had abandoned their child, Catherine H. Powers, on the 9th of June, 1894, leaving her without adequate support, and that he had not contributed to the support of the said child since the 1st day of October, 1897. The defendant was arraigned on this charge and pleaded not guilty, and the magistrate adjudged him a disorderly person. These things occurred on the same day, April twenty-fourth.

Out of the proceedings for abandonment of the wife sprang the proceeding for abandonment of the child. The question arises, can one proceeding support two judgments for distinct offenses and separate penalties?

Proceedings regarding disorderly persons are in their nature highly penal. They are calculated for a deprivation of liberty. They must be construed strictly, and every intendment must be in favor of the citizen.

It is said in Barbour's Criminal Law, 519, that "the complaint in writing is the substratum of the magistrate's jurisdiction and in the nature of an indictment. It should contain a complete statement of the offense, for the evidence given upon the trial can only support the original charge, but can by no means extend or supply what is wanting in the complaint."

Section 900, Code of Criminal Procedure, provides that upon complaint on oath against a person as being disorderly the magistrate must issue a warrant signed by him requiring a peace officer to arrest the defendant and bring him before the magistrate for examination. Section 901 provides that if the magistrate be satisfied from the confession of the defendant or by competent testimony that he is a disorderly person he must so adjudge, etc.

To support a judgment there must be a complaint on oath, an arrest, an arraignment, an examination and competent testimony. All these essentials were present in the judgment for the abandonment of the wife, but were not present in the judgment for the abandonment of the child.

The complaint was for the abandonment of the wife. This gave the magistrate jurisdiction to inquire into that charge and no other. The defendant was called upon to meet that charge and no other. Testimony directed to that charge was the "competent testimony" contemplated by the statute.

The testimony relating to an abandonment of the child was not

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competent testimony, and, therefore, could not be considered. It is true that after the examination and taking of testimony were concluded a complaint was made charging abandonment of the child, upon which an arraignment and plea of not guilty was had and a judgment thereupon was pronounced. But where is the "competent testimony" on this charge which is required by the law? Manifestly relation was had to the testimony taken under the first charge.

It is plain that the two judgments for abandonment of wife and child respectively were based upon the testimony taken in the examination on the charge of the abandonment of the wife. There was no "competent testimony" taken on an examination under a complaint charging abandonment of the child, and consequently there was not jurisdiction to pronounce judgment.

I am, therefore, compelled to reverse the conviction of the defendant as a disorderly person for abandonment of his child, on the ground that the magistrate had not acquired jurisdiction in the case.

Conviction reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* VICTOR S. FLETCHER, Defendant.

(Court of General Sessions of the Peace in and for the County of New York, September, 1901.)

Receiving stolen goods — New trial for newly-discovered evidence.

Where the course of a trial before a magistrate of a charge of receiving a violin knowing it to have been stolen, upon which trial the defendant was acquitted, as well as the nature of the evidence given upon a subsequent trial of an indictment for the same offense — at which trial admittedly the stolen violin was not produced and another was — indicated that the identity of the violin was a main issue of the second trial, the Court of General Sessions considered that evidence, discovered after the defendant had been convicted upon the indictment, establishing beyond question the fact that the stolen violin had been found, accompanied by its production in

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court upon a motion for a new trial, justified the granting of the same, where the new evidence also tended to prove that the violin had been found under circumstances which, if true, precluded the possibility of the defendant's having had it in his possession at the time of his arrest.

It is discretionary with a criminal court whether it will grant a new trial.

MOTION for a new trial upon the ground of newly-discovered evidence.

Austen G. Fox and John T. Canavan for motion.

Eugene A. Philbin, District Attorney, opposed.

GOFF, R. The defendant was convicted of receiving a Stradivarius violin which he knew to have been stolen from Professor Jean Bott. He offered for sale a violin which he asserted was a genuine Stradivarius, and by request took it to a house for examination, where it was identified as the stolen Bott violin. On leaving the house the defendant was arrested with the violin in his possession and arraigned before a magistrate. After a hearing the magistrate decided that the violin found in the defendant's possession was not the stolen Bott violin and discharged him, directing that the violin be returned to him.

Subsequently the defendant was indicted, and on his trial produced a violin which five witnesses swore was the violin which was produced before the magistrate, while ten witnesses swore that it was not; that it was simply an imitation of the genuine Stradivarius.

Upon this conflict of testimony an issue was raised as to the identity of the violin and the jury decided against the defendant. Of course, there were other questions which were considered by the jury in reaching a verdict, but the question of the identity of the violin was certainly an important one. The defendant appealed and the Appellate Division of the Supreme Court, by Mr. Justice Patterson, in affirming the conviction, declared that the charge of criminally receiving stolen goods was proven to a legal certainty as far as that may result from weighing conflicting testimony.

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Now comes the defendant and moves for a new trial on the ground of newly discovered evidence, which, in brief, is that the stolen Stradivarius has been found, and that under circumstances which, if true, would preclude the possibility of the defendant having it in his possession at the time of his arrest.

One fact is basic, and that is that a Stradivarius violin was stolen from Professor Bott on the 31st of March, 1894. In tracing the violin from that point two channels may be pursued, only one of which can be the true one. The channel which has been pursued has led to the condemnation of the defendant, and he now claims that that was not the true channel of inquiry, but that the one recently discovered is. In support of this claim a number of affidavits were presented and a large number of witnesses were examined and cross-examined at great length.

A very brief abstract of this testimony shows that on March 31, 1894, the day on which the violin was stolen, there was pawned in the pawn office of Benjamin Fox in this city a violin for four dollars and twelve cents, in the name of Hughes. When the legal time for redemption expired this violin was, with other articles, put in the pawnbroker's auction sale on April 24, 1895, and bought in by the pawnbroker. In the beginning of December, 1895, the violin was sold for twenty dollars. About four years ago one James Dooley went to Fox's pawn office and bought a violin for twenty dollars. This violin he pawned in several pawn offices, and each time redeemed it. He knew a family named Springer, whose son played the violin, and he brought the violin to them, and after some negotiating sold it to them. It was recognized by several experts as a very fine violin, and finally as a Stradivarius. Knowledge of its character circulated among violinists, until finally detective officers seized it and produced it in court on this motion. Dooley identified the violin as the one he had bought in the pawn office and sold to Springer. Springer identified it as the one he had purchased from Dooley. Pezzoni identified it as the one upon which he had made some repairs for Springer. Several violin makers and experts who had seen the Bott violin before it was stolen identified it as the stolen Stradivarius, and finally Mrs. Bott by certain marks and characteristics identified it as the violin that had been stolen from her husband.

For the first time in the history of this case there is an unanimity of opinion and statement of fact, that the violin now in court

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is the stolen Stradivarius. Therefore it may be safely assumed that the *corpus* of the crime is before the court. How did it come there? If this violin be the one that was taken from Springer, that was purchased by Springer from Dooley, that was purchased by Dooley from the pawn office, and that was pawned on the 31st of March, 1894, it follows that it was the Bott violin that was pawned, and, that being so, it further follows that the defendant could not have had the Bott violin with him at the time of his arrest. One indisputable fact stands out, and that is the identity of the violin. As to the integrity of its history, in the means and manner of its discovery and production, it is not necessary that I should express an opinion. It was a jury that convicted the defendant, and a jury should pass upon the value and good faith of the newly discovered evidence.

The question is not what I think of the evidence, but what in my opinion would a jury think of it, and my opinion is that if the evidence of the discovery of the violin, coupled with its production in court, had been before the jury, and believed by them, the result would probably have been different. This opinion in nowise detracts from the meritorious character of the verdict pronounced by the jury. It was just and fully warranted on the evidence before them. Nor can the defendant justly claim that he did not have a fair trial on the law and on the facts. That he did was demonstrated by Mr. Justice Patterson in the clear and exhaustive opinion which he delivered on the affirmance of the conviction.

But the defendant claims that since his trial and conviction the stolen violin, which was not present at his trial, has been discovered; that evidence as to its possession and location has also been newly discovered, and that the production of the violin and the newly discovered evidence on a new trial would result differently from his former trial.

The purpose of the administration of the law is justice. That is the object which all its rules and provisions are designed to accomplish. It is always in order to do justice. To grant a new trial under proper restrictions as to evidence newly discovered is one of the beneficent means by which a court can do substantial justice.

The English courts will not grant new trials in cases of felony, but will recommend a pardon. The courts of our State, more considerate of the defendant, will in a proper case grant a new trial.

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There is no hard and fast rule as to what is a proper case. Each case must be judged by its merits. Smith v. Matthews, 21 Misc. Rep. 150. In Barrett v. Third Ave. R. R. Co., 45 N. Y. 628, the Court of Appeals say: "Motions * * * for a new trial upon the ground of newly discovered evidence, are not governed by any well-defined rules, but depend in a great degree upon the peculiar circumstances in each case. They are addressed to the sound discretion of the court, and whether they should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view solely the attainment of that end." In Clegg v. N. Y. Newspaper Union, 51 Hun, 237, the court said that the test on motions for a new trial was substantial justice.

Considering the uncertainty and the wide divergence of expert opinion on the identity and authenticity of the Stradivarius and other violins of the recognized masters and the difficulties which beset the former trial, owing to the fact that the stolen violin was not present, and that there ensued a conflict of testimony as to its model, marks and characteristics, and that now that the stolen violin has been discovered and that its production in court will set at rest all questions as to its identity, I am of opinion that justice requires that a new trial be granted, and it is so ordered.

New trial granted.

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MEMORANDA

OF

CAUSES NOT REPORTED IN FULL.

SUPREME COURT, HERKIMER SPECIAL TERM, MAY, 1901.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* ELIAS KELLER, Defendant.

MOTION for a retaxation of costs.

P. H. McEvoy, for plaintiff.

Richard Hurley, for defendant.

HISCOCK, J. Defendant's motion for a retaxation of plaintiff's costs herein, striking out certain disbursements in excess of the amount of twenty-five dollars taxed by him as costs, is granted, with ten dollars costs of motion.

Section 3256, Code, makes certain disbursements like those taxed by plaintiff herein part of the costs which a party may tax. Section 3228 provides that in an action like this upon a recovery of any amount less than fifty dollars (in this case twenty-five dollars), the successful party may not tax costs to exceed the amount recovered. The provisions together mean that he may not tax all costs, including disbursements, in excess of the amount provided.

Motion granted, with ten dollars costs.

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SUPREME COURT, APPELLATE TERM, JUNE, 1901.

SOLOMON S. MIDDLETON, Respondent, *v.* ALEXANDER J. HALTER, Appellant.

APPEAL from a judgment of the General Term of the City Court of the city of New York, affirming a judgment rendered in favor of the plaintiff entered upon the verdict of a jury, at Trial Term, and also affirming an order denying a motion for a new trial.

Isaac V. Schavrien, for appellant.

Douglass & Minton (Henry B. Corey, of counsel), for respondent.

Per Curiam. This action was brought against defendant as indorser upon two promissory notes made by one Henry D. Stringer and of which plaintiff was the owner and holder. Each note was for $640, and interest; one was payable in three months after February 6, 1900, and the other in six months from said date. At maturity the three months' note was presented for payment, but was not paid, and subsequently it is claimed an agreement was made by plaintiff, who was still the owner and holder of the dishonored note, and defendant, that plaintiff should renew this note, and in consideration of his doing so defendant should indorse the six months' note and also the renewal note, and it is further claimed that, pursuant to this agreement, defendant indorsed both notes. Upon presentation at maturity neither of the notes was paid, and both were duly protested. The defense litigated upon the trial was that the indorsements were obtained by false and fraudulent representations made to the defendant regarding the terms and conditions of a deed of conveyance by which certain real estate had been conveyed by defendant to plaintiff. The false representations, it is conceded, were to the effect that defendant was liable for certain unpaid water rents and taxes. Whereas, in truth, no such liability existed. Defendant insisted that it was on reliance upon false representations regarding his liability by the terms of the deed that he was induced to indorse the notes, and not in consideration of the renewal of the dishonored note. The charge of the learned

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trial court indicates that the presiding justice entertained some pretty strong views on the facts, but no exception was taken to his remarks; the judgment was affirmed on appeal in the court below, and as our decision must rest upon exceptions properly taken we are not called upon to review the facts.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

EDWIN R. SMITH, Appellant, *v.* ALEXANDER McELWEE, Respondent.

APPEAL from an affirmance by the General Term of the City Court of the city of New York of a judgment rendered by a jury at a Trial Term of said court.

Richard J. Morrison, for appellant.

Nichols & Bacon (George Edwin Joseph, of counsel), for respondent.

Per Curiam. The one issue in the case was whether or not the goods, for the price of which the action is brought, were sold to the defendant, or to a corporation known as F. D. Anthony Company. It appears that there were two concerns having similar names, one a firm known as F. D. Anthony and Company, the other a corporation known as F. D. Anthony Company. There was no claim that the goods had been sold to the firm, and consequently the question whether the plaintiff had refused to give credit to the firm of F. D. Anthony & Co. was irrelevant. If the inquiry had been whether previous to the sales involved in this action he had refused credit to the corporation a different question would have been presented. The question whether the corporation was solvent was irrelevant, because unless knowledge or notice of its insolvency was brought home to plaintiff before or at the time the sales were made, the fact could throw no light upon the question as to whom he intended to make the sale. The certificate of incorporation was at the most immaterial and its admission cannot have hurt plaintiff, since the fact of the incorporation of the company had already been testified to by one

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of its officers. The verdict was justified by the evidence, and the judgment should not be disturbed.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Jennie Coppola, Respondent, *v.* Max Gross, as one of the Marshals of the City of New York, Appellant.

Appeal from an affirmance by the General Term of the City Court of the city of New York of a judgment rendered at Trial Term of said court.

H. J. Hindes, for appellant.

J. Palmieri, for respondent.

Per Curiam. Where the evidence is conflicting, this court declines to interfere with the jury's verdict. There seems, however, to have been immaterial evidence admitted at the trial under objection, which may well have affected the minds of the jury. The issues presented were title to merchandise and its market value at time levied upon by defendant, and the extent of the levy. Under these issues, the testimony of the plaintiff as to her father's business; the cross-examination of the witness Borschardt relating to the stock and affairs of a tea company, seems to have been proof entirely irrelevant and incompetent. This may well have prejudiced the defendant's rights and its admission furnished ground for reversal.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

The Hektograph Manufacturing Company, Appellant, *v.* Herman Knubel, Respondent.

Appeal from a judgment of affirmance by the General Term of the City Court of the city of New York, of a verdict of a jury rendered at a Trial Term of said court.

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Samuel H. Randall (John Delahunty, of counsel), for appellant.

Paskusz & Cohen (Martin Paskusz & William S. Gordon, of counsel), for respondent.

Per Curiam. The action was brought on two promissory notes. The answer pleaded the Statute of Limitations and that the notes were given for the accommodation of plaintiff, without consideration. Upon the trial the defendant gave evidence tending to show payment of the notes. Such evidence was inadmissible under the issues raised by the pleadings, but the record contains no objection and exception raising the question of inadmissibility. Both parties seem to have been agreed by tacit consent to try that issue. There were also portions of the charge which were outside of the issues, but no exception was taken, and no appropriate request to charge made. The few exceptions which were taken by the appellant raise no question requiring the reversal of the judgment.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

The Twelfth Ward Bank, Respondent, *v.* James Rogers, Appellant.

Appeal from an affirmance by the General Term of the City Court of the city of New York, of a judgment rendered at a Trial Term of said court.

Earley & Prendergast (Martin J. Earley, of counsel), for appellant.

Charles W. Dayton, for respondent.

Per Curiam. It seems from the testimony that the defendant received full consideration for his original indorsement. Upon renewal of the note, he sought to show an agreement with plaintiff's president that he should be held harmless upon his renewal indorsement. This fact is doubtful, but even if existent, it could

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not affect the plaintiff's rights, as its president had no power to release its debtor from liability, without consideration.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Victor Altman et al., Respondents, *v.* Ambrose A. McCall, Appellant.

Appeal from an affirmance by the General Term of the City Court of the city of New York, of a judgment rendered at a Trial Term of said court.

Isaac Fromme, for appellant.

J. Rosenzweig, for respondents.

Per Curiam. The defendant received no title to the merchandise under the insolvent assignment, because his assignors had no title thereto, it appearing that the goods were delivered to them on *memorandum.* The defendant, when he refused to surrender possession to the true owners, became liable individually, after demand was made. No exception is presented which affects the original disposition made of the case.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

William Turner, Respondent, *v.* Theresa A. S. Sheridan, Appellant.

Appeal from an affirmance by the General Term of the City Court of the city of New York, of a judgment rendered in favor of the plaintiff by a jury at a Trial Term of said court.

A. J. Martin, for appellant.

E. Swann, for respondent.

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Per Curiam. The verdict of the jury decided upon conflicting evidence that the original note was given by defendant for her own benefit. No reason appears for interference with that verdict, which disposes of the defendant's legal contention founded upon the New Jersey statute.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

MAX FISCHER, Respondent, *v.* JOSEPH CONHAIM et al., Appellants.

APPEAL from an affirmance by the General Term of the City Court of the city of New York, of a judgment rendered in favor of the plaintiff at a Trial Term of said court.

H. V. Rutherford, for appellants.

J. Wilkenfeld, for respondent.

Per Curiam. The nonpayment of the bonus, was by the contract of employment, made dependent upon an exercise by the defendants of their reserved right to discharge the plaintiff within the year. He was not discharged, but served the full term, without any expression of dissatisfaction. He was, therefore, entitled to the extra compensation.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ..

Judgment affirmed, with costs.

MORRIS L. GEFFEN et al., Respondents, *v.* THE UNION CLOAK & SUIT COMPANY, Appellant.

APPEAL from a judgment and order of the General Term of the city of New York, affirming a judgment entered upon the verdict of a jury at a Trial Term of said court.

Louis A. Jaffer, for appellant.

Joseph Martin (William L. Mathot, of counsel), for respondents.

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Per Curiam. The case presents no exception which raises any question of law.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Frank E. Rosen, Respondent, *v.* Jacob Silverman, Appellant.

Appeal from a judgment in favor of the plaintiff, rendered in the Municipal Court of the city of New York, fourth district, borough of Manhattan.

C. S. Rosenthal, for appellant.

A. I. Spiro, for respondent.

Per Curiam. Granting the power of the court below to grant the motion of the plaintiff's counsel, after resting his case and over the defendant's objection and exception, to change the cause of action from a sale and delivery of merchandise to one for damages for the breach of a contract for the sale and delivery of personalty, that will not uphold a judgment given for the purchase price. Such measure of damages is manifestly inaccurate, enabling the plaintiff to recover the price and retain the property. The correct measure of damage is the difference between the contract price and the value of the property at the time of the breach.

Judgment reversed and new trial ordered, with costs to abide the event.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

Morris Levin, Appellant, *v.* Sarah R. Spero, Respondent.

Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, seventh district, borough of Manhattan.

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James, Schell & Elkus, for appellant.

N. S. Levy, for respondent.

Per Curiam. The plaintiff found it necessary to call the defendant for the purpose of establishing his case. The defendant was certainly a hostile witness, and considerable latitude should have been given in her examination. The plaintiff had testified to conversations had with her which, if true, would strongly tend to establish her liability. In answer to the plaintiff's attorney, she denied the authority of her son to make any contract for her. Counsel put a series of questions to her regarding the conversations to which the plaintiff testified, and upon objection she was not allowed to answer them. We think that under the circumstances plaintiff was clearly entitled to a much wider opportunity for examining this witness than was permitted by the learned trial court.

Judgment reversed and new trial ordered, with costs to abide the event.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

Samuel Adams et al., Respondents, *v.* The Third Avenue Railroad Company, Appellant.

Appeal from a judgment rendered in favor of the plaintiffs in the Municipal Court of the city of New York, tenth district, borough of Manhattan. Action for negligence.

H. A. Robinson, for appellant.

Adams & Adams, for respondents.

Per Curiam. The plaintiffs' driver, upon his direct examination, testified that, when it became necessary for him to drive upon the defendant's track, he spoke to a boy who was riding on the seat of the wagon beside him and asked the boy if a car was coming from behind; that the boy said there was one standing upon the crossing at about a distance of 150 feet; that he then,

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without looking, turned in upon the track, and that, as he got upon the track and half way across, he looked to the south and saw a car approaching rapidly. In view of the rapidity and frequency with which electric cars are run and the continual necessity for vigilance to avoid accident, we are of the opinion that the plaintiffs' driver did not exercise the degree of care that devolved upon him.

Judgment reversed and new trial ordered, with costs to abide the event.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

Samuel Schwartz, Appellant, *v.* William Mylius, Respondent.

Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, second district, borough of Manhattan.

Martin Wechsler, for appellant.

Wendel & Robeson, for respondent.

Per Curiam. Action for conversion. The defendant was the owner and landlord of premises in which one Molnar conducted a restaurant. Molnar was in default for rent, and, on June nineteenth, he and the plaintiff, at a very early hour in the morning, removed the greater portion of the stock and fixtures, leaving the store in charge of a porter, who a few hours later delivered the key to the defendant. There were left in the saloon some fixtures and furniture, two barrels of beer and a small desk worth, according to the testimony, about three or four dollars. The plaintiff had, on May thirty-first, received a bill of sale from Molnar covering, among other things, the writing desk, and "all beer, liquors, brandies and wines in bottles and casks." This bill of sale had been kept secret at least until June nineteenth, and the goods covered thereby had been left in possession of Molnar, the vendor. Molnar had meanwhile mortgaged the fixtures and furniture to one Feldman, by a chattel mortgage duly filed, con-

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ditioned to secure the payment of the debt on demand. After the saloon had been surrendered to the landlord, Schwartz called upon him and said he wished to take the goods away. The testimony is conflicting as to whether Schwartz then notified the defendant that he made this demand as owner, or whether he exhibited his bill of sale. Feldman, the mortgagee, subsequently took possession of so much as remained of the furniture and fixtures covered by his mortgage. This he had a right to do, and the plaintiff is not entitled to a judgment for their return or value. As to the two barrels of beer there is no evidence, and no presumption that they were in the saloon when the bill of sale was made on May thirty-first. If they were not, they did not pass to the plaintiff under the bill of sale. As the saloon had been in active business between May thirty-first and June nineteenth, there is no presumption that the beer, found there on June nineteenth, had been there nineteen days previous. As to the desk, which is all that remains, and apparently all that the appellant really thinks he is entitled to judgment for, the evidence is not satisfactory that the plaintiff made a proper demand upon defendant for it. As it came into defendant's possession lawfully, being in the saloon when possession was surrendered by its apparent owner, a proper demand was necessary before an action for conversion would lie.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

William J. Wiersbach, Respondent, *v.* Delephine Bloch & Sabina Heidelmeiner, Appellants.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, second district, borough of The Bronx.

Nestor A. Alexander, for appellants.

Gantz, Neier & McKennell, for respondent.

Per Curiam. This is an action for damages for failure to deliver certain pianos under a contract. On September 6, 1900,

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the defendants agreed in writing to deliver to the plaintiff 250 pianos at a given price each, at the rate of five pianos a week. On October seventeenth, a new agreement was entered into for the delivery of 250 pianos at certain fixed prices, which agreement, it was stipulated, should cancel the agreement of September sixth. Between the date of the two agreements certain pianos had been ordered, which had not been delivered when the second contract was made. It seems to have been assumed on the trial, and we think that the evidence justifies the assumption, that it was intended by the parties that the second agreement should apply to the pianos already ordered under the first agreement. The agreement of October seventeenth did not provide for the rate of delivery or terms of payment. It is claimed by the plaintiff that this omission was supplied by a later agreement, which the defendants deny. That question was submitted to the jury and found in favor of plaintiff's contention. There was sufficient evidence to justify such a finding. The complaint alleged the making of the contract of October seventeenth; that the plaintiff performed all the conditions of the contract on her part, and that at all times before and on November 13, 1900, was ready and willing and offered to receive and pay for said pianos, which the defendants refused to deliver. The bill of particulars of plaintiff's claim for damages showed that he claimed to have lost the sale of twenty-eight pianos to several parties. There is no evidence to show that plaintiff, after November thirteenth, directed defendants to deliver any pianos, or that he sold or had opportunity to sell any pianos. In our opinion the plaintiff, by his complaint and bill of particulars, limited himself to a recovery of the damages he had suffered by reason of the failure of the defendants to deliver the twenty-four pianos ordered prior to November thirteenth. The justice refused, although requested by defendants' counsel, to thus limit the plaintiff's recovery. In this we think he erred, and for this error the judgment must be reversed. Certain other questions have been suggested as to the refusal of the justice to charge, which, in view of the conclusion to which we have arrived, need not be passed upon.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial granted, with costs to abide event.

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HENRY W. FISHEL et al., Respondents, *v.* LEVI C. WEIR, as President of THE ADAMS EXPRESS COMPANY, Appellant.

APPEAL from a judgment rendered in favor of the plaintiffs in the Municipal Court of the city of New York, seventh district, borough of Manhattan.

Guthrie, Cravath & Henderson, for appellant.

Jacob Marks, for respondents.

Per Curiam. The provisions of the statute of Iowa, section 3130, as to "unclaimed property" were not complied with, as appears from the agreed statement of facts. Owners' whereabouts were unknown; they had been twice requested for instructions regarding the disposition they wished made of the rejected package, and it is admitted that they had no notice of the amount of the carrier's charges due and unpaid as required by this provision. Irrespective of the other questions involved, the sale was unauthorized by law, and the judgment below should be affirmed, with costs.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

LULU RICHARDSON, Appellant, *v.* ALBERT BORRILL, Respondent.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, eleventh district, borough of Manhattan.

G. A. C. Barnett, for appellant.

William Henry Knox, for respondent.

Per Curiam. A judgment in favor of the plaintiff was reversed by this court in June, 1900. 32 Misc. Rep. 718.

The evidence upon the present trial is substantially the same that was presented then, except that on this trial the plaintiff herself did not testify. The action is in replevin for certain household furniture claimed to have been sold by plaintiff's mother to defendant, and of which plaintiff asserts ownership.

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The evidence as to her ownership is very hazy and most unsatisfactory. Even if some of it belonged to her she allowed her mother to exercise dominion over it, and can scarcely have been ignorant of the transaction between her mother and the defendant. It was attempted to be shown that the mother expressly exempted the goods from the sale to the defendant, but the documentary evidence in the case made strongly against this contention, and the efforts of the witness to explain away her receipts and bill of sale were not convincing. On the whole, we are of opinion that the case was rightly decided.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Marks Silver, Respondent, *v.* Joseph Elias, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

Shafer & Levin, for appellant.

Ralph Nathan, for respondent.

Per Curiam. A former judgment in favor of the plaintiff was set aside by the Appellate Term because against the weight of evidence. If the evidence on the present trial had been the same as that on the former we might adopt a like course. There is, however, an important difference. It was testified by an apparently disinterested witness that the note in suit was brought to Kaplan, the payee, by one Cohen, the manager of defendant's business. On the former trial Cohen was called and denied that he had ever seen the note, that it was given him by defendant, or was delivered to Kaplan. On the present trial Cohen was not called, and consequently the evidence of the delivery of the note to Kaplan was uncontradicted. We have examined the exceptions and find none that call for a reversal, and under all the circumstances are not disposed to interfere with the second judgment.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

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ROBERT F. DWYER, Respondent, *v.* THE METROPOLITAN STREET RAILWAY COMPANY, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, ninth district, borough of Manhattan.

H. A. Robinson (G. Glenn Worden, of counsel), for appellant.

John J. Quencer, for respondent.

Per Curiam. Although the evidence was conflicting there was sufficient to justify the judgment. If it were held to be contributory negligence as a matter of law to attempt to cross a railway track with a horse and wagon when a car is a block and a half away, all travel except by surface cars would practically have to be suspended. The motorman admits that he saw the wagon on or near the track when he was about a block away, and he should then have taken the necessary measures to avoid a collision. His story that the horse swerved into the car after he had safely cleared the wagon lacks corroboration, and the justice was warranted in disregarding it.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

MEYER SOSOFSKY, Respondent, *v.* THE METROPOLITAN STREET RAILWAY COMPANY, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, first district, borough of Manhattan.

H. A. Robinson (G. Glenn Worden, of counsel), for appellant.

A. H. Sarasohn, for respondent.

Per Curiam. The plaintiff's ice wagon was compelled, in consequence of obstructions in the street, to go upon the defendant's track. A car coming up behind, the driver whistled, and plain-

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tiff's driver immediately started to drive off the track so as to allow the car to pass. Before the wagon had gone clear the car collided with it and caused the accident. This was all in plain daylight. It was attempted to be shown that there was a scale bar projecting six or seven inches behind the ice wagon, and that it was this that the car caught. The driver testified that he saw it plainly. While it may have been contrary to the ordinances to have the scale where it was, such violation did not justify the driver's negligence in catching it. The justice submitted the case to the jury in a charge which was even more favorable to defendant than it had a right to ask.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

AUGUSTUS NOLL, Respondent, *v.* GEORGE LEVY & BERNARD S. LEVY, Appellants.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

Wolf, Kohn & Ullman, for appellants.

Harry A. Archibald, for respondent.

Per Curiam. This is an action to recover the amount due upon a certain contract for electrical work and materials. The amount due to the plaintiff is not disputed. The defendants are sued as copartners, the allegation being that Geo. W. Levy and Bernard S. Levy, his father, did business as partners under Geo. W. Levy's name. The plaintiff's testimony on this subject is that Bernard S. Levy made statements to him to the effect that he was embarrassed, and could do no business in his own name, and, therefore, did it under cover of his son's name. He certainly was active in the supervision of the work. Any copartnership is denied by both defendants, but their attempted explanations of the elder Levy's connection with the work are contradictory and unsatisfactory. Upon the whole the evidence was sufficient to justify the finding that they were jointly engaged in the enterprise

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in connection with which the plaintiff did work. It was attempted to show that the plaintiff consented to a composition between Geo. W. Levy and his creditors. The evidence tendered to support this plea was that plaintiff had said that he would agree to anything a majority of the creditors agreed to, and that a majority of the creditors did agree to refrain from bringing action for a certain period. This was all denied by the plaintiff and the justice found in his favor upon the issue.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Louis Adelson, Respondent, *v.* Jacob Futuransky, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, sixth district, borough of Manhattan.

Stern & Stern, for appellant.

Cohen Brothers, for respondent.

Per Curiam. The defendant was justified in refusing to accept a partial performance of the plaintiff's contract. The plaintiff recognized this and offered to accept a return of the goods. The defendant undertook to return them by an expressman of his own choosing, who for this purpose became his agent. He was bound to return all the goods or none, and the plaintiff had the right to refuse to accept a partial return. The defendant in point of fact did not return the goods he had received, and should pay their value. The judgment, as rendered by the justice, was irregular, and should be modified so as to be a simple money judgment for sixty-six dollars, the proven value of the goods, with interest and costs, and as so modified, is affirmed, without costs.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment modified and as so modified affirmed, without costs.

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MAX ASHINOFF, Respondent, *v.* SAMUEL SIVIN et al., Appellants.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

B. Gerson Oppenheim, for appellants.

Elias Rosenthal, for respondent.

Per Curiam. The question which was litigated was whether the defendants employed the plaintiff for a definite term of six months or merely took him for a week on trial. On this question the evidence was conflicting, and we see no reason to disturb the finding of the jury. There was no evidence to justify the submission to the jury of the question whether there had been what defendants call an accord and satisfaction between the parties, by which he apparently means an agreement to abrogate the contract. The plaintiff certainly worked for a week and accepted a check which was expressed as being "in full payment of all claims up to date." That had no apparent reference to any future claim either for services or for damages for breach of contract. The evidence of damage was meager, but the plaintiff showed that he made twenty-five dollars during the week that he did work for defendants, and the jury apparently based their verdict upon a much smaller probable profit for the balance of the term.

Judgment should be affirmed, with costs.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

ALBERT BORRILL, Appellant, *v.* MINNIE H. BARTON, Respondent.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, eleventh district, borough of Manhattan.

William Henry Knox, for appellant.

G. A. C. Barnett, for respondent.

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Per Curiam. This case was tried with that of Richardson v. Borrill, and upon the same evidence so far as applicable. If the latter case was rightly decided, as we think it was, it is not apparent how this judgment can be sustained. That action was for the replevin of certain goods sold by the defendant here to the plaintiff, and claimed to have been the property of defendant's daughter. The present action is for two pieces of furniture which was delivered back to defendant. She claims that they were sent back to her on her demand because not included in the bill of sale. The plaintiff and his wife say that they were sold to defendant at her request. At all events they were within the issues decided in the Richardson v. Borrill action. The defendant herself testifies "we got two pieces and the expressman took them down. One was a tea table and the other a hat rack. They are in the list demanded in the other action because we did not separate them." We think that the judgment in the Richardson v. Borrill action was decisive of the only question involved in the present action.

Judgment reversed and new trial ordered, with costs to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

JOSEPH A. FLINN, Respondent, *v.* WILLIAM S. MILLER, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, third district, borough of Manhattan.

Glover, Sweezy & Glover, for appellant.

H. A. Geney, for respondent.

Per Curiam. This case is distinguishable from Brooks v. Mortimer, 10 App. Div. 518. In that case the grocer's bills were made out to the purveyor, and the purveyor's personal checks given in payment thereof. In the case at bar, while the dealings continued for some years, plaintiff's bills were always made out, and, in some instances, mailed by the plaintiff to the defendant in

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his own name, and the mere fact of the coachman coming with the money to pay the same was not a circumstance at variance with every day dealings, and could not constitute notice sufficient to put plaintiff upon inquiry.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Carrie E. Stevens, Appellant, *v.* The Siegel-Cooper Company, Respondent.

Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, third district, borough of Manhattan.

Gantz, Neier & McKennell, for appellant.

Rose & Putzel, for respondent.

Per Curiam. Plaintiff was the owner of a picture called Christ and the Magdalene; she claims that she hired the picture to defendant to be used by it in decorating its rooms in a food show exhibition, but she admits that no amount of rent was fixed, and that she rendered no bill until a year afterwards. The defendant, through its witnesses, acknowledge that the picture was hung in its rooms, but assert that the use was voluntarily given it by plaintiff in the expectation that its exhibition under the circumstances might enable her to dispose of it by sale. The picture was seven by nine and its fair and reasonable market value was stated by plaintiff's expert to be $500. This same witness testified $75 a week was a reasonable rent charge. There was a conflict of evidence upon the question as to whether the picture was hired or voluntarily loaned, and an examination of the testimony warrants the decision reached by the court below. Some exceptions were taken to rulings upon the admission of evidence, and while from a highly technical standpoint such rulings may be open to criticism, still the preponderance of absolutely competent testimony was in defendant's favor.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

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JOSEPH GARLICK, Respondent, *v.* LOUIS MEYERS, Appellant.

APPEAL from an order setting aside a verdict rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

Leon Sanders, for appellant.

Stanislaus N. Tuckman, for respondent.

Per Curiam. The justice was right in setting aside the verdict. The evidence was clear that the coach in question was allotted to plaintiff in the division of the partnership property; that it was afterwards found in defendant's possession; that the plaintiff demanded its return and that defendant refused to give it up. These facts established the plaintiff's right to recover. The defendant offered no evidence to show how he came into possession of the coach, or what claim of right, if any, he had to its possession. It is not important whether the coach was put in plaintiff's stable or taken away by defendant on the night that the division was made. In either event it belonged to the plaintiff and later was found in defendant's possession. If he had any right to its possession he should have made the fact to appear.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Order affirmed, with ten dollars costs.

ALBERT H. ATTERBURY, Appellant, *v.* STANLEY A. SOMERS, Respondent.

APPEAL from a judgment of the Municipal Court of the city of New York, first district, borough of Manhattan, rendered in favor of the defendant.

A. H. Atterbury, for appellant.

S. Campbell, for respondent.

Per Curiam. The defendant's tender of the amount due extinguished the boarding-house keeper's lien. At common law

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and by statute, an innkeeper had a lien upon the goods of his guest for the amount actually due, and by chapter 446, Laws of 1899, a boarding-house keeper is given a lien "for the amount which may be due for board." His lien is practically the same as that of an innkeeper. The plaintiff might have brought an action in replevin, it is true, but to hold that his failure to do so should be permitted to bar his claim for a return of the amount paid under protest would be to lay down a very harsh rule.

Judgment reversed and judgment directed for plaintiff.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and judgment directed for plaintiff.

THE F. W. DODGE COMPANY, Appellant, *v.* SOLOMON MAY, Respondent.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, sixth district, borough of Manhattan.

J. S. Montgomery, for appellant.

C. B. Palmer, for respondent.

Per Curiam. It seems to this court that the learned justice erred either in the construction of the written agreement, in that it could be terminated at any time upon giving the specified notice, whereas it lasts by its terms for one year, and thereafter may be ended upon giving of the notice, or that he failed to notice the want of any testimony in the defendant's behalf of a breach by the plaintiff. The contract provided that plaintiff shall furnish "such information as it is able to obtain" regarding the subject-matter. An examination of the record fails to show any breach by plaintiff in that behalf, while the defendant admits receipt of the reports for the full term of one year.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

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JOHN M. BURTSELL, Respondent, *v.* JONAS C. H. TUPPER, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, eleventh district, borough of Manhattan.

G. Finck, for appellant.

M. J. Joyce, for respondent.

Per Curiam. Irrespective of the alleged demerits in the answer, the defendant's motion to dismiss the complaint because of failure to state facts sufficient to constitute a cause of action should have been granted. That pleading is defective from the omission to allege the fact of the nonpayment of the face amount of the capital stock issued at the time the debt to the plaintiff was incurred, and also the number of shares held by the defendant. The plaintiff is in any event bound to present to the court a cause of action, when his having done so is properly questioned.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

SAMUEL DIAMONDSTONE, Appellant, *v.* ISIDOR GUTSTADT et al., Respondents.

APPEAL from a judgment rendered in favor of the defendants in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

Shafer & Levin, for appellant.

Manheim & Manheim, for respondents.

Per Curiam. The real issue upon the trial related solely to an increase of three cents a dozen, insisted by the plaintiff to have been made between him and the defendants. The plaintiff's

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testimony was too inexact in favor of such an agreement, while each defendant expressly denied the making of such an arrangement. The court below found for the defendants on the question and awarded the plaintiff somewhat more than the defendants had paid into court, but without costs. We think this conclusion should rest undisturbed.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Henry W. Goodrich, Respondent, *v.* Pierre V. A. Brett, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, second district, borough of Manhattan.

Herbert W. Taylor, for appellant.

White & Wing, for respondent.

Per Curiam. The contract provides, "in the event of defendant being defeated that he will pay the disbursements incurred by plaintiff past and future" and, further, that, in the event of success, defendant shall pay plaintiff one-third of the amount recovered by him not only in the pending suit, which was but for an installment, but one-third of the total amount recovered under the contract. The words "defeated" and "success" as used in the contract must be held to mean success or defeat in the action, as the action was the subject-matter of the contract. Defendant, it is admitted, succeeded in the action, and as disbursements were only to be paid by him in the event of defeat the decision of the learned trial justice was erroneous.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

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C. Venton Patterson, Appellant, *v.* Frances J. Treadwell, Respondent.

Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, eighth district, borough of Manhattan.

George P. Breckenridge, for appellant.

Louis Frankel, for respondent.

Per Curiam. There were four causes of action: for work, labor and services; balance due upon a contract; money paid out; and rent. The answer was payment, and was amended by adding accord and satisfaction. At the close of the testimony the learned trial judge said: "I hold that there was an accord and satisfaction as appears from plaintiff's Ex. No. 10." By an examination of the plaintiff's exhibit No. 10 we find that it was an agreement between the plaintiff and the defendant by the terms of which the plaintiff accepted the surrender of the laundry for the unexpired term of the defendant's lease upon certain terms regarding the payment of past rent and other things to which the defendant agreed. As the action was in part for the rent past due, it is difficult to see how the agreement can be an accord and satisfaction.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

The John Kroder & Henry Reubel Company, Appellant, *v.* Martin Foery et al., Respondents.

Appeal from a judgment rendered in favor of the defendants in the Municipal Court of the city of New York, second district, borough of Manhattan.

T. Prince, for appellant.

S. Feuchtwanger, for respondents.

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Per Curiam. The testimony plainly shows a renting by plaintiff to defendants of the store for one year to January 1, 1901. The defendants vacated the premises some three months before their term expired, for purposes of their own, and have not paid the rental due, amounting to $120. The plaintiff was entitled to a judgment for that amount. We can imagine no reason for a dismissal of the complaint.

Judgment reversed and new trial ordered, with costs to abide the event.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

Sidney N. Moon, Appellant, *v.* Stewart Marks, as Pres., etc., Respondent.

Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

Ford & Tuttle, for appellant.

C. C. Nadal, for respondent.

Per Curiam. Aside from other questions, there are some undisputed facts, which fully support the conclusion of the learned court below. These may be briefly stated. There is no proof of any employment of the plaintiff by the defendant association, to render the services claimed for. There is a lack of evidence that they were rendered for the association by, even the suggestion of itself, or any of its officers. It also appears that the plaintiff represented one of the associate corporations, in the association, and that the services rendered by him were as representative of that corporation, with a strong probability that he was compensated therefor by it. We think the court below was right.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

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ISAAC STERN, an Infant, by Guardian, etc., Respondent, *v.* THE METROPOLITAN STREET RAILWAY COMPANY, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

H. A. Robinson (G. Glenn Worden, of counsel), for appellant.

S. N. Tuckman, for respondent.

Per Curiam. The evidence for the plaintiff shows a lad six years old, and near the middle of the block he attempted to cross the rails, when the defendant's horse car was approaching from a point four or five houses distant. The boy was struck by one of the horses and injured. The case was submitted to the jury on this proof, a motion to dismiss the complaint having been denied. Conceding the driver negligent, the child was equally so, and the motion to dismiss should have been granted.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

HATTIE C. SCHOELLER, Respondent, *v.* WILLIAM P. SCHOELLER, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal court of the city of New York, ninth district, borough of Manhattan.

H. Levor, for appellant.

T. W. McKnight, for respondent.

Per Curiam. It plainly appears that there was a verbal agreement made January 11, 1900, for a sale by the defendant to the plaintiff of his bakery for the sum of five hundred dollars, the defendant and his brother to bind themselves not to engage in like business within a limited territory for one year. The plaintiff then paid fifty dollars on the purchase price, and was to pay the balance on the Saturday following, which she was ready and

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willing then to do, but the defendant, without legal reason, declined to perform. These facts are found by the verdict of the jury. The exceptions to the allowance by them of the items beyond the payment of fifty dollars, are not well taken, because they were properly incurred by plaintiff in preparing to perform her part of the undertaking, except the lawyer's fee of ten dollars, for which the defendant was not to be held liable in any event.

The judgment will be affirmed if reduced by the sum of ten dollars, if not it will be reversed and a new trial ordered, with costs to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed if reduced by ten dollars, if not judgment reversed and new trial ordered, with costs to abide event.

CALVIN S. WESER, Appellant, *v.* SYLVIA THRONE, Impleaded with ARTHUR J. HANDLEIN et al., Respondents.

APPEAL from a judgment rendered in favor of the defendants in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

S. Sturtz, for appellant.

Black, Olcott, Gruber & Bonynge, for respondents.

Per Curiam. The positive testimony of the plaintiff's witness Stover, of having left the contract of rental and the account for the first month's rental, with a clerk of the hotel, is sufficient to establish the giving of the notice necessary to charge the defendants with knowledge that the piano was the property of the plaintiff and was not owned by the guest. This is clearly shown, notwithstanding the purely negative and somewhat contradictory testimony of hotel employees. Under the notice given, the defendants could not acquire any lien.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

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WILLIAM HERMAN, Respondent, *v.* SAMUEL LECY et al., Appellants.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

Levy & Unger, for appellants.

E. A. Klein, for respondent.

Per Curiam. The plaintiff's claim was for seventy-nine and thirteen-hundredths dollars, under an alleged agreement for five per cent. commissions upon a sale of merchandise under an alleged employment by the defendants. The plaintiff, if his testimony was believed in the court below, was entitled to a judgment for his whole claim. If the defendants' contention was credited, they were entitled to judgment. The learned justice awarded judgment for plaintiff in the sum of twenty-six dollars and seven cents. This award is in no way supported by the proofs. An arbitrary decision cannot be upheld on appeal because there is no evidence to support it, and is wholly without the principle of *secundum allegata et probata.*

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

ROBERT R. REED, Appellant, *v.* THE ERIE RAILROAD COMPANY, Respondent.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, first district, borough of Manhattan. Reargument.

R. R. Reed, for appellant.

Stetson, Jennings & Russell, for respondent.

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Per Curiam. The contract of transportation between the plaintiff and defendant was fully performed by the latter, when the plaintiff's trunk reached its destination and he advised of its arrival, whereupon he voluntarily surrendered his check to the station agent. Whatever may have been done thereafter in the way of procuring an expressman, by the agent, was for the plaintiff's convenience, and in no way imposed any liability upon the defendant.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Julia Trusty, Respondent, *v.* The Metropolitan Street Railway Company, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, third district, borough of Manhattan.

H. A. Robinson (G. Glenn Worden, of counsel), for appellant.

F. D. Tansley, for respondent.

Per Curiam. Under the question at folio 16 of the record, the physician was called upon to testify to the fact, which the jury was impanelled to decide. He should have been asked a hypothetical question, and the jury could have considered his opinion upon that issue. There is no evidence by the expert, sufficiently explicit, to connect the flowing and pains, as direct results of the injury. That testimony should have been excluded by the learned court below, especially as it appeared undisputed that the plaintiff had long suffered from a tumor, which well may have induced those ailments.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

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M. Groh's Sons, Respondents, *v.* Charles Schneider et al., Appellants.

Appeal from a judgment rendered in favor of the plaintiffs in the Municipal Court of the city of New York, eighth district, borough of Manhattan. Reargument.

G. Nathan, for appellants.

C. S. Bloomfield, for respondents.

Per Curiam. There is no question involved in this appeal, save the position of the plaintiffs in regard to the check upon which the suit is brought. It would seem from the record that the payee in the check, Louis Schneider, was presumptively a holder in due course. He indorsed it and gave it to Feldman, who, as between themselves, may, from circumstances, have held different rights in law. Feldman, as holder, soon after its receipt, transferred the check to the plaintiffs in payment of a precedent debt. The plaintiffs are not shown to have any knowledge of any equities existent between Schneider, the payee, and Feldman. They, therefore, became holders in due course from that transfer, and also possessed of all the rights presumptively held by Louis Schneider, the payee.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Benjamin M. Kremer, Respondent, *v.* Max Adler et al., Appellants.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

S. Goodelman, for appellants.

Sanders & Feltenstein, for respondent.

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Per Curiam. The testimony clearly shows that the account presented to the defendants on January 22, 1901, was correct and past due. The alleged arrangement then said to have been entered into between defendants and the plaintiff's agent, that they should pay less than the amount of the bill in full of same, and return some of the goods, was at once repudiated and disavowed by the principal and notice thereof given to the defendants. The deduction from the account was thus rendered nugatory. It is quite true the plaintiff retained and used the defendants' check for the reduced sum, which was marked "in full to date." This of itself has no weight, there being nothing in way of settlement of disputed claims to serve as a consideration, or any element to support an accord and satisfaction.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

THE V. LOEWER'S GAMBRINUS BREWERY COMPANY, Respondent-Appellant, *v.* EDWARD L. LITHAUER, Appellant-Respondent.

APPEAL from a judgment rendered in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

Bennett & Silverman, for defendant-appellant.

C. J. G. Hill, for plaintiff-respondent.

Per Curiam. There are cross-appeals herein. It seems too late to question here the authority of the defendant officially to levy under the execution. Independently also of the question whether the lien of the chattel mortgage or that of the execution was prior in time, it seems to us that the court below should have dismissed the complaint upon the proof of the order of the defendant as marshal to Lewis Levy as marshal, he at that time holding the writ of replevin. The defendant thereby parted with possession, transferring it in obedience to the writ. That order subsequently appeared in plaintiff's possession.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

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JOHN SULLIVAN et al., Respondents, *v.* TRUMAN H. BALDWIN, as Pres., etc., of ANTI-SALOON LEAGUE, Appellant

APPEAL from a judgment rendered in favor of the plaintiffs in the Municipal Court of the city of New York, second district, borough of Manhattan.

H. C. Spurr, for appellant.

W. K. Griffin, for respondents.

Per Curiam. This judgment must be reversed. The order for the awning, the price whereof the suit is brought, was given by a Mr. Ratcliff. There is an absence of evidence that Mr. Ratcliff was authorized by the league or any of its officials to make the purchase, and because of that the judgment must be reversed. Where a recovery is sought under the action of an agent of the defendant, there must be some proof of authority to bind his alleged principal.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

JAMES B. ADRIANCE et al., Respondents, *v.* FRANK NETSCHERT, Appellant.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, eighth district, borough of Manhattan.

W. C. Findlay, for appellant.

J. P. O'Brien, for respondents.

Per Curiam. The representations of plaintiff Adriance as to the condition of the water pipes and arrangements connected therewith, to prevent leakage, were independent of the lease itself and binding. The damages incurred in that behalf should have been allowed in the court below. Even had that been done,

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the plaintiffs were entitled to a judgment for the balance of their claim and interest, which should have been awarded to them, instead of a judgment for defendant as ordered.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

ALIDA B. CRAIG, Appellant, *v.* MARY ROBERTSON, Respondent.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

McElheny & Bennett, for appellant.

James E. Smith, for respondent.

Per Curiam. While the conflicting testimony may render the disallowance of compensation from August twentieth to the date of actual employment on September eighth correct, the judgment given is manifestly erroneous for these reasons: there is an admission that the sum of seventeen and eighty-five-one-hundredths dollars is due the plaintiff for services rendered, and there was no legal tender of that sum by payment into court; had there been it would be insufficient, because the plaintiff at the second trial was entitled, in addition to the costs on her successful appeal, with disbursements and the costs paid below on the first trial.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

PAUL B. PUGH, Respondent, *v.* THOMAS F. O'ROURKE, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, eleventh district, borough of Manhattan.

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E. M. Friend, for appellant.

H. S. Mack, for respondent.

Per Curiam. It seems to us that the acceptance of the keys of the apartment and the immediate efforts of the plaintiff to relet the same on his own account were sufficient evidence of the plaintiff's acceptance of the surrender. The allowance of the full rent due was, therefore, error; the judgment below should have been limited to the sum of eighty dollars, due June 19, 1900. If the principal recovery shall be by stipulation reduced to that sum, with interest, the judgment in that event will be affirmed, without costs in this court. If not so reduced the judgment will be reversed and a new trial ordered, with costs to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, without costs, if reduced to eighty dollars. If not so reduced, judgment reversed, with costs to abide event.

HYMAN WIDROVITZ, Appellant, *v.* THE METROPOLITAN STREET RAILWAY COMPANY, Respondent.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, ninth district, borough of Manhattan.

Frank Herwig, for appellant.

H. A. Robinson (G. Glenn Worden, of counsel), for respondent.

Per Curiam. The evidence shows that the plaintiff went deliberately upon the track about fifty feet ahead of a moving car. Some trucks passing along the street prevented his going ahead, but it does not appear that there was anything to prevent his stepping back. This he made no effort to do. It may be that he was justified in going on to the track, but when he found that

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he could not cross he should have made some effort to retrace his steps.

The judgment is right and should be affirmed.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed.

ISAAC WEISS, Respondent, *v.* LOUIS E. WOLFF, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, second district, borough of Manhattan.

A. Solomon, for appellant.

S. Fleischmann, for respondent.

Per Curiam. Second appeal. First judgment in favor of defendant reversed by Appellate Term. 33 Misc. Rep. 770. Second trial, judgment for plaintiff. If the first reversal was right, the issue being one of fact, this judgment must be affirmed.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

JOHN J. BRIERLY, Respondent, *v.* MARTIN CONNELLY, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, second district, borough of The Bronx.

John P. Flanigan, for appellant.

Thomas Garret Fennell, for respondent.

Per Curiam. There were questions of fact upon which the evidence was conflicting. The case was submitted to the jury under an unexceptionable charge. There are no exceptions in the case calling for comment.

Judgment should be affirmed, with costs, without opinion.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

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ISRAEL PASHKOWSKY, Respondent, *v.* JULIUS DISKIN & MORRIS BERGIN, Appellants.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, first district, borough of Manhattan.

Manheim & Manheim, for appellants.

Elias Rosenthal, for respondent.

Per Curiam. The plaintiff's own version of the transaction between himself and defendants does not justify a judgment in an action for conversion, nor is the judgment, as rendered, appropriate in such an action.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

JULIUS ERLANDSON, Respondent, *v.* FRANK S. GROH, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, first district, borough of Manhattan.

William R. Hill, for appellant.

Douglass & Minton, for respondent.

Per Curiam. There is nothing in this case except a conflict of evidence, and we see no reason to reverse the conclusion arrived at by the justice. The question put to the witness Hunt as to the condition of the machine at some undesignated time was properly excluded, because the issue was not as to its condition after it had been used by defendant, but as to its original capability for doing the work for which defendant ordered it.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

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ANNIE EDWARDS, Respondent, *v.* THE HARTFORD FIRE INSURANCE COMPANY, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

William D. Murray, for appellant.

D. Frank Lloyd, for respondent.

Per Curiam. This case is not to be distinguished from Bryce v. Lorillard Ins. Co., 55 N. Y. 240. Under the rule declared in that case, which has never been modified or departed from, the defendant established a complete defense, and should have prevailed.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial granted, with costs to appellant to abide event.

ABRAHAM LEVY, Respondent, *v.* ISAAC ZEMAN, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, second district, borough of Manhattan.

Abraham L. Goldstone, for appellant.

Aaron Morris, for respondent.

Per Curiam. The evidence would have justified a judgment against both defendants. It was upon the appellant's own motion that no judgment was rendered against the codefendant. He cannot now be heard to object that his motion was granted. The judgment was not against the weight of evidence. The defendant's story that the services were rendered as a matter of courtesy only is most improbable.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

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ISAAC LIBERMAN et al., Respondents, *v.* ISAAC WILSON, Appellant.

APPEAL from a judgment in favor of the plaintiffs rendered in the Municipal Court of the city of New York, seventh district, borough of Manhattan.

Fluegelman & Bach, for appellant.

Stern, Singer & Barr, for respondents.

Per Curiam. In this action, which is for goods sold and delivered, the defendant interposed a general denial. The record is absolutely bare of evidence as to the amount, character or value of the goods alleged to have been sold. How the justice arrived at the figure for which he awarded judgment it is impossible to guess. The judgment must be reversed and a new trial granted, with costs to abide the event.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial granted, with costs to abide event.

JOSEPH L. JACKSON, Appellant, *v.* JOSEPH BULIFANT et al., Respondents.

APPEAL from a judgment rendered in favor of the defendants in the Municipal Court of the city of New York, eleventh district, borough of Manhattan.

Howard Ellis, for appellant.

Vincent Rosemon, for respondents.

Per Curiam. All of the sales, except those to Worth & Co. and Lewis Marks, were evidenced by written sales-notes drawn by plaintiff himself. From these sales-notes, it appears that the so-called sales were conditional upon the buyer's approval of the goods. They did not approve them and consequently no sale was effected. The plaintiff earned no commissions upon these

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transactions. As to the Worth and Marks items, the evidence was conflicting and we see no reason to disturb the finding of the justice.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Solomon Karpel, Respondent, *v.* Mendel Kasse, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

Abraham I. Spiro, for appellant.

Elias Rosenthal, for respondent.

Per Curiam. The receipt given by plaintiff on June 9, 1900, was at best but *prima facie* evidence that the payment then made covered all previous transactions between the parties. The plaintiff swore that it did not cover the goods the value of which is sued for here, and the defendant swore it did. The justice had the witnesses before him and was in a better position than we can be to decide which was most reliable. By an apparent error of calculation, judgment was rendered for one dollar and fifty cents too much. It should be modified by deducting that sum, and as modified affirmed, without costs.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment modified, and as modified affirmed, without costs.

Michael B. Masse, Respondent, *v.* The Metropolitan Street Railway Company, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, first district, borough of Manhattan.

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H. A. Robinson (G. Glenn Worden, of counsel), for appellant.

Herman Gottlieb, for respondent.

Per Curiam. The case turned upon the question of contributory negligence of the plaintiff's driver in attempting to cross a track ahead of a moving car. The question was submitted to the jury in a charge to which no exception was taken. The jury having found in favor of plaintiff, we see no reason to disturb their verdict.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

PATRICK SWEENEY, Respondent, *v.* JACQUES SENN, Appellant

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, third district, borough of Manhattan.

Hamilton & Griffing, for appellant.

J. T. Lee, for respondent.

Per Curiam. There is no negligence shown in the record, which produced the loss of the overcoat. There was a course of procedure in the care of the room, established by the defendant, as proprietor, and even that procedure is not connected with the loss, and if it had appeared to have been, the plaintiff had long acquiesced in the care of the room and the management of the key, and was himself negligent.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

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JOHN HEITMAN, Appellant, *v.* MEYER L. SIRE, Respondent.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, eleventh district, borough of Manhattan.

A. Byrne, for appellant.

No appearance for respondent.

Per Curiam. It may be conceded that the contract to bid on the property at a judicial sale for the sole purpose of advancing the price, was void as against public policy. The evidence, however, shows that the plaintiff's employ for the succeeding days was made after that action was completed, and this agreement in no way involved the question of public policy. For this reason we think the conclusion of the learned court below was erroneous.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

PHILIP STROMBERG, Respondent, *v.* ROSE AMELIO, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, second district, borough of Manhattan.

Goepel & Wahle, for appellant.

E. Rosenthal, for respondent.

Per Curiam. There is some confusion from the evidence arising from the use of the masculine pronoun in the plaintiff's testimony; this may be from an error of the stenographer. There appeared on the trial that two watches were sold by the plaintiff, one to the defendant and another to a third person which was afterwards returned. There is no evidence that the watch sold to the defendant was ever returned or the balance due therefor was ever paid.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

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SOLOMON INSKY, Respondent, *v.* BENJAMIN MACHAT, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

M. M. Greenstein, for appellant.

E. Rosenthal, for respondent.

Per Curiam. The infirmity in the trial, whereof this judgment is the result, is that there is no proof that defendant ever satisfied the debt, after having reached majority. The only evidence is that he made a promise to one Schwartz in the summer of 1900. The defendant was born June 5, 1879, so the promise may have been made prior to June 5, 1900.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

DAVID SOLOMON, Appellant, *v.* THE THIRD AVENUE RAILROAD COMPANY, Respondent.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

A. H. Sarasohn, for appellant.

Hoadly, Lauterbach & Johnson, for respondent.

Per Curiam. The testimony of the plaintiff and his one witness was sufficient to make a *prima facie* case, and the case should, therefore, have been heard on the merits. The evidence tends to show that the car stopped on plaintiff's signal, and was started again without affording a reasonable opportunity for him to board it.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

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AUGUSTUS W. BARNEY, JR., Respondent, *v.* HENRY MACKAY, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, first district, borough of Manhattan.

R. A. M. Hobbs, for appellant.

P. H. Loftus, for respondent.

Per Curiam. The motion to dismiss the complaint at the close of plaintiff's case should have been granted, because there was entire absence of facts, showing any negligence by the driver of the runaway horses. Also, upon the whole case, it may be added, that there is no proof that he was either negligent or unskillful. The horses were frightened by the near passage of an elevated train.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

MORRIS BRODSKY, Respondent, *v.* THE METROPOLITAN STREET RAILWAY COMPANY, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

H. A. Robinson (G. Glenn Worden, of counsel), for appellant.

I. Cohen, for respondent.

Per Curiam. Although the evidence might well lead to a different conclusion from that reached by the learned justice in the court below, it was, nevertheless, conflicting, and there is not a preponderance in defendant's favor sufficiently strong to warrant this court in disturbing the verdict.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

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ADOLPH HOROWITZ, Appellant, *v.* CHARLES E. SMITH, Respondent.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, sixth district, borough of Manhattan.

J. R. Tressider, for appellant.

J. E. Brodsky, for respondent.

Per Curiam. A review of the testimony shows that the court below, upon conflicting evidence as to the status and authority of Skinner, found in favor of the defendant. That conclusion necessarily resulted in a judgment for the defendant, and we are disinclined to disturb it, in face of the conflict in the proofs.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

THOMAS LENANE, Respondent, *v.* THE BRESLOW-WEISS CIGAR MANUFACTURING COMPANY, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, first district, borough of Manhattan.

Lewkowitz & Schaap, for appellant.

B. L. Kraus, for respondent.

Per Curiam. This judgment cannot be sustained because the defendant corporation was not incorporated when the premises were leased, and no subsequent ratification by it appears. The record also shows that the premises were rented by Breslow and Weiss individually.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

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AUGUSTUS L. MCCREA, Respondent, *v.* PEETE B. CLARKE, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

Holt & Duross, for appellant.

E. S. Hull, for respondent.

Per Curiam. It appears by the testimony that the plaintiff's assignor fulfilled all his obligations under the written contract, while the defendant defaulted under his obligation to dispose of the $500 of stock for the personal benefit of the plaintiff's assignor. It is difficult to imagine how the learned court below could have reached a different conclusion.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

MYRA VINCENT, Respondent, *v.* THE METROPOLITAN STREET RAILWAY COMPANY, Appellant.

APPEAL from a judgment rendered in the Municipal Court of the city of New York, first district, borough of Manhattan, in favor of the plaintiff.

H. A. Robinson (G. Glenn Worden, of counsel), for appellant.

H. Gottlieb, for respondent.

Per Curiam. The plaintiff's testimony, wholly uncorroborated, is flatly contradicted by the evidence of three disinterested witnesses, and in addition that of the motorman and conductor. The verdict, therefore, is manifestly against the weight of evidence.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

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CATHERINE HAENLEIN, Respondent, *v.* JULIA M. MEYER, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

E. H. Benn, for appellant.

Denis O'Sullivan, for respondent.

Per Curiam. On conflicting evidence, the justice found for the plaintiff, and his conclusion is amply supported by the plaintiff's testimony which the court seems to have accepted as correct. The point that the plaintiff's husband was the proper party to sue was not raised below, and it is too late to present it for the first time on appeal. On the trial, defendant's counsel disclaimed any purpose of moving for a nonsuit, stating that he desired a judgment on the merits. We see no reason for disturbing the judgment rendered and the same must be affirmed, with costs.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

J. HALLETT LOVELL et al., Respondents, *v.* JOHN ROEBUCK, Appellant.

APPEAL from a judgment rendered in the Municipal Court of the city of New York, third district, borough of Manhattan, in favor of the plaintiffs.

Edmund F. Driggs, for appellant.

Herbert J. Hindes, for respondents.

Per Curiam. The plaintiffs' cause of action was abundantly sustained by the evidence. The defendant repeatedly admitted the correctness of the account except as to a few small items

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which appear to have been allowed to him. The counterclaim seems to have been an afterthought, as it was wholly disallowed; it is of no consequence whether the justice was right or wrong in refusing the motion to allow defendant to increase the amount for which he counterclaimed.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Louis Handler, Appellant, *v.* The Metropolitan Street Railway Company, Respondent.

Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

David W. Rockmore, for appellant.

H. A. Robinson (G. Glenn Worden, of counsel), for respondent.

Per Curiam. The plaintiff failed to show either negligence on the part of the defendant or lack of negligence on his own part. His testimony is somewhat confused, but justifies the conclusion that he ran to board a moving car, and either slipped or stumbled as he was in the act of boarding it.

The judgment is right and should be affirmed, with costs.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Albert Hughes, Respondent, *v.* Charles Martin, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, second district, borough of Manhattan.

S. G. Derrickson, for appellant.

Jeroloman & Arrowsmith, for respondent.

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Per Curiam. The indisputable evidence showed that defendant, under an assumed name, employed the plaintiff as a broker in realty to perform services for him. Those services were rendered, and the defendant failed to pay the regular commission. We think the judgment awarded for such commission is correct.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment affirmed, with costs.

HENRY H. MCCORKLE, Respondent, *v.* WILLIAM H. ELLIS, Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

William C. Prime, for appellant.

Henry H. McCorkle, for respondent.

Per Curiam. The record offered in evidence was not exemplified as required by the Revised Statutes of the United States, section 905; neither can the transcript of the justice with the certificate of the county clerk attached be availed of, as Texas is not an adjoining State. Code Civ. Pro., § 948; Bent v. Glaenzer, 17 Misc. Rep. 569. The only other method of proving the jurisdictional fact is by common-law proof.

Present: SCOTT, P. J., BEACH and FITZGERALD, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

JAMES B. CAHILL, Appellant, *v.* MAX LICHTENSTADTER, Respondent.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, eighth district, borough of Manhattan.

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Holt & Duross, for appellant.

J. Martin, for respondent.

Per Curiam. The evidence sufficiently establishes a *prima facie* case. The truck had painted upon it the words, "M. Lichtenstadter, 54th Street and 1st Avenue." It was loaded with what appeared to be flour barrels. Defendant was engaged in the flour business at 986 First avenue, near Fifty-fourth street. The facts established were sufficient to put defendant upon his proof. Doherty v. Lord, 8 Misc. Rep. 227; Seaman v. Koehler, 122 N. Y. 646.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial ordered, with costs.

Charles Perceval, Respondent, *v.* The Metropolitan Street Railway Company, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, third district, borough of Manhattan.

H. A. Robinson (G. Glenn Worden, of counsel), for appellant.

Spencer, Stickney & Ordway, for respondent.

Per Curiam. There is nothing in this case save a conflict of evidence, the preponderance being with the plaintiff.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Isaac Bernstein, Respondent, *v.* Jacob D. Behrman, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, second district, borough of Manhattan.

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Stanislaus N. Tuckman, for appellant.

Marks & Marks, for respondent.

Per Curiam. There is nothing in this appeal. There was only a question of fact, as to which the testimony was conflicting.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Samuel Kolasky, Appellant, *v.* The Metropolitan Street Railway Company, Respondent.

Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

A. S. Sarasohn, for appellant.

H. A. Robinson (G. Glenn Worden, of counsel), for respondent.

Per Curiam. Plaintiff's exception to the ruling of the court upon the question of the admission of the ordinance was well taken, and requires a reversal of the judgment.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment reversed and new trial ordered, with costs to abide event.

Augustus L. McCrea, Respondent, *v.* The Carlstadt Chemical Company, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

Holt & Duross, for appellant.

E. S. Hull, for respondent.

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Per Curiam. The record contains no exceptions, nor any other proceeding, which would enable this court to interfere with the jury's verdict.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Abraham Grob, Respondent, *v.* Elias Gottfried, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

J. Rieger, for appellant.

H. Lesser, for respondent.

Per Curiam. The evidence was conflicting, and the judgment of the court below was correct.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

Henry Rochmovitz, Respondent, *v.* Perceval H. Seward, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

M. Monfried, for appellant.

D. W. Rockmore, for respondent.

Per Curiam. It would seem unfair to allow the defendant to amend and increase the original specifications he had submitted to plaintiff, and which he had accepted in writing. That end should have been sought in a more mutual manner.

Present: Scott, P. J., Beach and Fitzgerald, JJ.

Judgment affirmed, with costs.

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CITY COURT OF NEW YORK — GENERAL TERM, MAY, 1901.

GEORGE F. LOSCHE, Appellant, *v.* JAMES TAYLOR, Respondent.

APPEAL from a judgment for the defendant entered upon the verdict of a jury, and from an order denying the plaintiff's motion for a new trial upon the minutes.

Alvin Summers, for appellant.

Theodore Prince, for respondent.

FITZSIMONS, Ch. J. Upon the argument of this appeal, the respondent's attorney contended that, at the trial, the methods adopted by the appellant's attorney and the testimony of his witnesses were so confusing that even the trial justice could not make head or tail of this case. The verdict of the jury also shows that they likewise were confused and lost sight of the issues involved, because, in spite of the fact that the defendant admitted that he owed the plaintiff twenty-five dollars, they found a verdict in the defendant's favor. The evidence has also confused us. In view of all the facts and circumstances surrounding this action, we think that the interests of justice will be best served by granting a new trial.

Judgment reversed and a new trial ordered.

DELEHANTY and SCHUCHMAN, JJ., concur.

Judgment reversed and new trial ordered.

MARGARETHA MILLER, Respondent, *v.* THE METROPOLITAN STREET RAILWAY COMPANY, Appellant.

APPEAL from a judgment of the City Court of the city of New York in favor of plaintiff.

Henry A. Robinson (John T. Little, of counsel), for appellant.

Alfred & Charles Steckler (Charles Steckler, of counsel), for respondent.

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FITZSIMONS, Ch. J. The evidence conclusively proves that plaintiff was injured through the negligence of defendant's servant, and that she was free from contributory negligence. She was seriously injured; two of her fingers were rendered useless; one of her arms she cannot raise higher than her ear, and it is quite useless. She was confined to her room for several weeks, suffered pains and aches and was otherwise physically and mentally injured and distressed. For all these injuries the jury awarded her $1,500, which, we think, was quite reasonable. The defendant thinks the verdict grossly excessive, and this apparently is the only justification which it has for taking this appeal.

The judgment is affirmed, with costs and disbursements to respondent.

DELEHANTY and SCHUCHMAN, JJ., concur.

Judgment affirmed, with costs to respondent.

PATRICK F. DICKINSON, Respondent, *v.* HAMILTON H. SALMON, Appellant.

APPEAL from a judgment entered on a verdict by a jury in favor of the plaintiff, and from an order denying the defendant's motion for a new trial. The "trial before the Surrogate" referred to in the opinion was an accounting in the Matter of the Estate of Frank Yoran.

Johnston & Johnston (Edward W. S. Johnston, of counsel), for appellant.

George F. Langbein, for respondent.

SCHUCHMAN, J. The complaint sets forth as a cause of action, plumbing repairs amounting to $136.38, made between January 7 and March 30, 1896, ordered by one Frank Yoran, as agent of the defendant. The answer sets up a general denial. At the trial, the making of the repairs and the reasonable value thereof was proved by the plaintiff and not disputed by the defendant. The defendant's contention is, *first,* that there is a failure of proof that he, the defendant, had authorized Yoran to order the repairs to be made, or to employ the plaintiff to make them; and,

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second, that he, the defendant, was not acting as a principal, but as the agent of his mother. The evidence adduced at the trial shows that Yoran died on April 13, 1897, and that, for about three years prior thereto, he collected the rent of the premises upon which the said repairs were made, and sent the defendant a monthly statement of the rents, crediting thereon his commission and expenses *for repairs,* and also sending checks to the defendant's order for the balance, and which checks the defendant indorsed in his own name. The evidence further shows that, on November 16, 1899, the defendant individually brought a suit in the New York Supreme Court against the executors of Yoran, on a verified complaint, wherein the defendant alleged that theretofore, and for several years prior to his death, that is, the said Yoran's death, that he, Yoran, was employed by this plaintiff (the defendant herein) as agent to collect for the plaintiff, and to turn over to him the rents of certain real property, and that said Yoran owed him, the plaintiff (this defendant), for rent collected and not paid over to him, $1,997.50; and which allegations were reaffirmed by the defendant's testimony at the trial before the surrogate. From this evidence the jury had the right to infer that Yoran was the defendant's agent authorized to order repairs to be made, and that the defendant was liable as principal. The defendant, being an interested witness, the jury had also the right to disbelieve his testimony.

We, therefore, think that substantial justice has been rendered by the jury's verdict, and the judgment and order appealed from are affirmed, with costs.

DELEHANTY, J., concurs.

Judgment and order affirmed, with costs.

FRANK S. STREEP, Respondent, *v.* JOHN MCLOUGHLIN et al., Appellants.

APPEAL from an order denying defendants' motion for a new trial, on the ground of newly-discovered evidence.

A. B. Malcolmson, for appellants.

Howe & Hummel (Nathaniel Cohen, of counsel), for respondent.

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Per Curiam. The order appealed from, denying motion made by appellants for a new trial, upon the ground of newly-discovered evidence, was properly denied. The evidence, so-called newly-discovered, was not discovered by defendants until after the trial, because of the careless manner in which their case was prepared for trial. The witnesses, who had knowledge of these alleged newly-discovered facts, were in defendants' employ at the time of the trial, and were present in court during the trial as witnesses for appellants, but owing, as before stated, to the careless manner employed by defendants and their counsel, the evidence now sought to be made use of in their behalf was not disclosed by them, because of their indifference and careless examination of these two witnesses. If we should award defendants a new trial in this case, we should simply be rewarding careless litigants and lawyers, and trials would be never-ending, a result which we do not desire to see, or careless efforts which we do not desire to reward and encourage.

Order appealed from must be affirmed, with costs and disbursements.

Present: FITZSIMONS, Ch. J., DELEHANTY and SCHUCHMAN, JJ.

Order affirmed, with costs.

FRANK S. STREEP, Respondent, *v.* JAMES MCLOUGHLIN et al., Appellants.

APPEAL from a judgment in favor of plaintiff entered on a verdict.

A. B. Malcolmson (J. A. McCreery, of counsel), for appellants.

Howe & Hummel (Nathaniel Cohen, of counsel), for respondent.

Per Curiam. The judgment is sustained by the weight of evidence. The charge of the judge, we think, was faultless. Evidently, the appellants even so considered it, because, after its delivery, no exception to it was taken by them. Their criticism of it at this time does not appeal to us. We think it fairly and truly stated the law applicable to the case. If it was not full or comprehensive enough to suit appellants, their attorney should

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have made proper requests to charge, which undoubtedly would have been properly submitted to the jury. Their complaint in that regard, in our judgment, is now too late to benefit them.

After carefully considering the whole record, we think the conclusion of the jury was a just and proper one.

Judgment affirmed, with costs and disbursements.

Present: FITZSIMONS, Ch. J., DELEHANTY and SCHUCHMAN, JJ.

Judgment affirmed, with costs.

ROBERT LEE, Respondent, *v.* THE THIRD AVENUE RAILROAD COMPANY, Appellant.

APPEAL from a judgment in favor of plaintiff, entered upon a verdict rendered at trial term, and also from an order denying defendant's motion for a new trial.

Hoadly, Lauterbach & Johnson (Henry Siegrist, Jr., and Herbert R. Limburger, of counsel), for appellant.

Rodolphe Claughton (Abraham Oberstein and Max D. Steuer, of counsel), for respondent.

Per Curiam. We have examined with care the record herein, and are of the opinion that, on the testimony adduced, the case was properly one for a jury. With their findings we are not disposed to interfere, as there is no such preponderance of evidence to justify it.

The charge of the trial justice was fair and impartial, and correctly stated, as a whole, the principles of law governing the case in question. While the instruction that the motorman of the car was bound to avoid the accident was error, the same was subsequently cured by the statement that he was bound to exercise that care and caution that a prudent man would exercise in order to avoid a collision. This was certainly inconsistent with the previous charge upon the same point, and was obviously made to correct the error stated. The rule is well settled that, where a judge, in charging a jury, lays down erroneous propositions, but subsequently corrects the misdirection and gives the true rule, no error is presented for a review. We think the withdrawal mentioned met the requirements of Chapman v. Erie Railway Co., 55 N. Y. 579; Falke v. Third Ave. R. R. Co., 38 App. Div.

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49, and that the jury were not influenced by the erroneous instruction first stated.

The judgment, therefore, should be affirmed, with costs.

Present: FITZSIMONS, Ch. J., and DELEHANTY, J.

Judgment affirmed, with costs.

BERNARD KREIZER, Respondent, *v.* YOSHIZO KITAOKA, Appellant.

APPEAL from an order adjudging the defendant guilty of willful contempt of court.

Stern, Singer & Barr (William J. Barr, of counsel), for appellant.

Fromme Brothers (James A. Douglas, of counsel), for respondent.

Per Curiam. The order appealed from must be affirmed. The record shows willful contempt for the court's mandate. The defendant disposed of his property contrary to the injunction contained in the order for his examination, thereby causing plaintiff's damage in, at least, the sum of $250.

The order appealed from is affirmed, with costs.

Present: FITZSIMONS, Ch. J., DELEHANTY and SCHUCHMAN, JJ.

Order affirmed, with costs.

CITY COURT OF NEW YORK, GENERAL TERM, JUNE, 1901.

ERNEST O. JACOBSEN, trading under the firm name of JACOBSEN & COMPANY, Respondent, *v.* WILFRED BUCKLEY, trading under the firm name of SAMUEL BUCKLEY & COMPANY, Appellant.

APPEAL from a judgment entered upon a verdict and from an order denying a motion for a new trial.

Reed, Simpson, Thacher & Barnum (Nathan A. Smyth, of counsel), for appellant.

Howard R. Bayne, for respondent.

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CONLAN, J. The action was brought to recover the difference between the market value of a quantity of ore and the amount paid on account thereof, the said ore being claimed by plaintiff to have been an over-delivery.

The record presents no charge of the trial judge, and we assume, therefore, that the case was submitted to the jury upon all the evidence, and that such submission was acceptable to the defendant.

The appellant presents three questions for review on this appeal, and asks for a reversal of the judgment because:

First. There was no evidence, as he says, to show that any ore was delivered which was not required to be delivered under the contract.

Second. That, if more ore was delivered than the contract required, there is no evidence to show that such over-delivery was unintentional and by mistake.

Third. That before the mistake, if any, was made, this ore, as the defendant claims, had been sold by the plaintiff to other parties, and the plaintiff, for that reason, had neither property nor possession therein entitling him to recover any value in this action.

As to the first ground, we find in the record a distinct statement by the plaintiff that this over-delivery was a subject of conversation between the parties, and at the time of settlement for the delivery under the contract is said to have been left for future adjustment.

As to the second ground, it is also in evidence that the plaintiff had endeavored to find and locate this quantity of missing ore, and the attention of the defendant was called to the fact that the plaintiff claimed it as an unintentional delivery, and demanded pay for such excess at the market value at that time, and which was refused. It is equally true that the defendant claims to have paid for all ore delivered under the contract, but, at the same time, he admits that 1,194 tons were delivered, whereas the contract was for 1,067 tons. As to this excess of 127 tons, the theory of the defense is that there was a custom that a variation in quantity of from one to ten per cent. was not considered as an over-delivery. The evidence on this latter point is vague and uncertain.

As to the third ground, it appears that a contract for the delivery of the excess ore, which, it is claimed, plaintiff had sold to other parties, and for which he seeks to recover, as is alleged, of

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this defendant, was to be performed at Antwerp, Belgium, by a delivery there, and, if that be the case, then there was no transfer of ownership by the plaintiff of the ore in question.

Under the third ground of objection, within the rule laid down in Gilbert v. New York C. & H. R. R. R. Co., 4 Hun, 378, and McDonald v. Hewett, 15 Johns. 349, the whole case having been submitted to the jury without objection, the defendant should be held to the consequences and not now be heard to complain of the result of their deliberations.

We have examined the whole case with considerable care, and find nothing therein which calls for an interference with the result obtained in the trial court.

Judgment and order appealed from must be affirmed, with costs.

O'Dwyer, J., concurs.

Judgment and order affirmed, with costs.

William F. Clemmons, Respondent, *v.* Isaac Brinn, Impleaded with others, Appellant.

Appeal from a judgment entered upon a verdict and from an order denying a motion for a new trial.

Levy & Unger (Charles Haldane, of counsel), for appellant Brinn.

Abraham A. Joseph, for respondent.

Conlan, J. The action is in replevin, brought to recover possession of 373 3-8 yards of cloth, and the particular description of the property as given by the plaintiff, and upon which he relies for identification, is, "whether the same is manfactured or unmanufactured, or in process of manufacture, but capable of identification," as the same appears in the plaintiff's affidavit, and precisely the same language appears in the complaint.

The defendant Brinn alone defends, and, as one of his defenses, pleads a discharge in bankruptcy, and also joins issue upon the chief allegations in the complaint.

Fraud is the very essence of the case at bar, and it is upon this very ground that the plaintiff seeks to rescind a contract of sale

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and to recover his property or its value. The case bristles all over with allegations and evidence of fraud and fraudulent intent, and so the learned trial judge, in one of the questions which he submitted to the jury, said: "Were the goods fraudulently purchased by the defendant Ellen Pinstein?" The finding of the jury upon all of the evidence, and under the charge of the court, which was eminently fair to the defendant, was to the effect that the transaction between the plaintiff and the defendant Pinstein was a fraud practiced upon the former, and that the possession of the property, which was the subject of the action, by the defendant Brinn, was, under the circumstances detailed, such an acceptance and adoption by him of the fraud of his codefendant as to render him liable, and because of these fraudulent practices he cannot and could not in law claim any immunity by reason of his alleged discharge in bankruptcy.

We think the verdict of the jury is well supported by the evidence, and that no errors were committed upon the trial to the prejudice of the defendant, and, holding these views, we think the judgment and order appealed from should be affirmed, with costs.

HASCALL and O'DWYER, JJ., concur.

Judgment affirmed, with costs.

GUSTAV BUESING, by HUGO H. WEICHELT, his Guardian ad litem, Respondent, *v.* THE METROPOLITAN STREET RAILWAY COMPANY, Appellant.

APPEAL from a judgment entered upon a verdict and from an order denying a motion for a new trial.

Henry A. Robinson (John T. Little and Ambrose F. McCabe, of counsel), for appellant.

Max D. Steuer (Abraham Oberstein, of counsel), for respondent.

CONLAN, J. The action was brought to recover for injury alleged as a consequence of the defendant's negligence, and the one question submitted by the defendant on this appeal is that the verdict is grossly against the weight of evidence. The amount

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demanded was $1,500, and the verdict just half that sum. No advantage accrues to the defendant by reason of his exception to the ruling on the motion for a dismissal of the complaint at the close of the plaintiff's case. He accepted the alternative offered him, gave evidence in his own behalf and thereby waived the motion. Reade v. Con. Trust Co., 49 App. Div. 400; Hopkins v. Clark, 158 N. Y. 299.

By introducing the evidence, the defendant created a sharp conflict, upon which the whole case was fairly submitted to the jury.

We do not find in the record before us the preponderance of evidence in favor of the defendant which it so boldly asserts in its brief. The jury were at liberty to consider and determine what weight was to be given to all of the evidence and, for reasons which appear to have been sufficient to them, a different value was placed upon the testimony of the defendant from what the counsel claims for it. If, for reasons satisfactory to them, they discredited any portion of the evidence advanced by the defendant, it was clearly their province to do so, and courts on appeal are very reluctant to disturb the finding of a jury where the evidence has been of a sharp, conflicting character. The theories of the plaintiff and defendant as to how the accident occurred were widely different, and we are not disposed to differ from the jury with the conclusion arrived at.

The other exceptions taken by the defendant do not affect, in our opinion, the single question before us on this appeal, and the judgment and order appealed from must, therefore, be affirmed.

O'Dwyer, J., concurs.

Judgment and order affirmed.

Robert Friedman, Respondent, *v.* Peter J. Herter et al., Appellants.

Appeal from a judgment entered upon the report of a referee.

John F. Coffin, for appellants.

Shapiro & Shapiro (Aaron S. Shapiro, of counsel), for respondent.

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CONLAN, J. This action was brought to foreclose a mechanic's lien upon certain premises on West Fifty-second street, in the city of New York. After issue joined, the case was referred to a referee to hear and determine. The complaint demands $400 as a balance due under the contract between the parties, and $530 for extra work. The judgment is for the $400, interest and costs, the charge for the extra work not having been found in the plaintiff's favor.

We have examined the whole case, and think there was ample evidence to sustain the findings and conclusions reached by the learned referee, and do not find any reason for disturbing the conclusions reached by him, and the judgment appealed from must, therefore, be affirmed.

O'DWYER, J., concurs.

HASCALL, J. (dissenting). It appears to me that plaintiff did not show substantial compliance with the terms of his agreement as to his work, nor did he produce the architect's certificate that he was entitled to payment. For these reasons I dissent.

Judgment affirmed.

ROSE ALBERS, Appellant, *v.* FREDERICK J. ALBERS et al., Respondents.

APPEAL from an order requiring plaintiff, as a non-resident, to give security for costs.

George C. Coffin, for appellant.

M. Charles Foley, for respondents.

CONLAN, J. The order requiring the plaintiff to give security for costs was made upon affidavits submitted by both sides. The affidavits of the two defendants positively assert that, at the time of the commencement of the action, the plaintiff, their sister, resided with her father at 752 Putnam avenue, Brooklyn, and that she still so resided in March, 1901. The affidavit of the plaintiff as positively states that she removed from 752 Putnam avenue about September 20, 1900, where she had been residing with her father, and engaged a room at 101 Waverly Place, Manhattan,

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and has since continuously resided there. If the latter were a real fact, it would not have been difficult to have corroborated the statement in her affidavit. She, however, failed to satisfy the justice sitting at Special Term of the truth of her statement, and there does not appear in the record any sufficient reason calling for an interference with the determination reached by the court below.

The order appealed from must be affirmed, with costs.

HASCALL and O'DWYER, JJ., concur.

Order affirmed, with costs.

ARTHUR H. GORSE, Respondent, *v.* FRANKLIN LYNCH, Appellant.

APPEAL from a judgment entered upon a verdict directed by the court.

Francis B. Chedsey, for appellant.

F. De Lysle Smith, for respondent.

CONLAN, J. This is an action to recover the consideration expressed in a contract for the sale of the good will of a business. The parties were copartners, and the agreement for dissolution provided for the payment of a fixed sum on or before a certain day. That day had passed when the action was brought. The defendant, in his answer, set up certain affirmative defenses, calling for an accounting between the parties as to the profits of the business and the apportionment to be made thereof between the parties, by way of indicating that plaintiff had received more than his share thereof over and above the amount demanded in the complaint as the consideration for the transfer.

This court has no equity jurisdiction to take and state an account between parties, and the rulings of the trial judge were, in our opinion, correct and proper. In an action for that purpose brought in a court of equity full justice could be done to any and all claims made by the defendant, and if any injustice were done to him by the judgment in this action he would have full remedy to correct the same. Under the agreement as it existed between the parties at the time of the commencmnt of this action, and the evidence as adduced upon the trial, the plaintiff's right to recover

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was absolute, and the direction of a verdict in his favor for the amount claimed was a determination of the issues with which we are not inclined to interfere.

Judgment appealed from must, therefore, be affirmed, with costs.

HASCALL and O'DWYER, JJ., concur.

Judgment affirmed, with costs.

JAMES A. NOONE, Respondent, *v.* JOHN B. FINN et al., Appellants.

APPEAL from a judgment entered upon a verdict and from an order denying a motion for a new trial.

Leventritt & Brennan (George M. Leventritt, Samuel P. Goldman, of counsel), for appellants.

William H. Deady, for respondent.

CONLAN, J. The action was brought to recover the alleged value of a quantity of lumber sold by the plaintiff to defendants. The only question in dispute was concerning the quality of the lumber delivered, and because thereof the defendants claimed a reduction of twenty dollars in the amount of the bill. The case is neither long nor difficult, and no exceptions appear to have been taken to the charge to the jury.

Upon the question of quality, there was a dispute between the witnesses for the plaintiff and defendants, and the difference thus arising was submitted to the jury, and they determined the same in favor of the plaintiff. With such a determination upon a conflict of evidence, courts on appeal are not disposed to interfere. It was a simple question of fact, and, to our minds, not difficult to determine, and we do not find in the record any reason for disturbing the conclusions reached by the jury.

Judgment and order appealed from must be affirmed, with costs.

HASCALL and O'DWYER, JJ., concur.

Judgment and order affirmed, with costs.

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PABLO EMILIO OBREGON, Respondent, *v.* ELIAS A. A. DELIMA et al., Defendants, EDWARD DELIMA, Appellant.

APPEAL from an order denying a motion to vacate an order for the examination of the defendant before trial.

Weil & Weil (Arnold Charles Weil, of counsel), for appellant.

Parsons, Shepard & Ogden (Wm. Mason Smith, H. B. Closson, of counsel), for respondent.

CONLAN, J. The affidavit upon which the order to examine the defendant was granted is, in our view, amply sufficient on which to have granted the application. It presents a case under subdivision 4 of section 872 of the Code of Civil Procedure, which, in our mind, entitles the plaintiff to the relief asked. Subdivision 4 provides that the affidavit shall set forth the name and residence of the person to be examined, and that the testimony of such person is material and necessary for the party making such application, or the prosecution or defense of such action. The affidavit not only does this in the precise language of the section and subdivision, but it does a great deal more, and the defendant, whose examination is sought, could in no manner be prejudiced by an examination such as is asked for, and had in accordance with the provisions of the section.

This case may well be distinguished from that of the Broad Street Bank v. Sinclair in this court, reported in 16 N. Y. Supp. 88. Here the examination is not asked for so as to dispense with the necessity of procuring other or absent witnesses. The reason for it is more plainly stated, that the foreign witness upon whom the plaintiff might confidently rely is a resident of a country afflicted with serious political and internecine strife, and other reasons are given why his attendance could not be procured at the trial, or his evidence obtained on commission, and the object is to prevent surprise on the trial. The defendants do not, in our view of the case, present any substantial or well-founded reason for interfering with the result reached at Special Term, and the order appealed from should, therefore, be affirmed, with costs.

HASCALL and O'DWYER, JJ., concur.

Order affirmed, with costs.

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JACOB FRANKEL et al., Respondents, *v.* LOUIS BROWN, Appellant.

APPEAL from order denying appellant's motion to vacate an attachment upon the ground that the papers upon which the same was granted were insufficient.

Myers, Goldsmith & Bronner (Leonard Bronner, of counsel), for appellant.

Henry Kuntz, for respondents.

HASCALL, J. While we, in the main, agree entirely with the appellant's contention regarding the law, yet we do not find that the facts quite meet the requirements necessary to bring the authorities cited effectually to bear upon the question of this appeal, which is, whether, or not, the papers were insufficient because facts were not shown which made a specific sum due to the plaintiffs, over and above all counterclaims.

We find the case at bar even stronger in fundamental facts than Lawton v. Reil, 34 How. Pr. 465; for here the means were furnished by the papers themselves to compute the exact amount of damage claimed by plaintiffs.

Order must be affirmed, with costs and disbursements to respondents.

CONLAN, J., concurs.

O'DWYER, J. (dissenting). I dissent. The proof failed to show that, at the time the attachment was issued, the plaintiffs were entitled to recover the sum of $960, as damages for their wrongful discharge.

Order should be reversed and motion granted, with ten dollars costs and disbursements.

Order affirmed, with costs to respondents.

OSCAR S. BAILEY, Appellant, *v.* GEORGE J. KRAUS, Respondent.

APPEAL from judgment entered upon dismissal of the complaint at trial term at the close of the case.

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Warren, Boothby & Warren (L. E. Warren, of counsel), for appellant.

Chas. L. Hoffman, for respondent.

HASCALL, J. Action was brought by plaintiff to recover for the board and care of defendant's horses and carriages. Defendant set up a discharge in bankruptcy. The learned court at trial term dismissed the complaint under the case of Stevens v. King, 16 App. Div. 377.

We think this was error. The authority cited is certainly good so far as requisites of notice to creditors and proofs thereof are concerned, but does not go to the extent of deciding that, under an indifferent pleading, any testimony offered, concerning bankruptcy and proceedings incident thereto, must be received as binding, whether complete or not, interlocutory or final.

In the case before us, there is no evidence of a decree of discharge nor offer to prove one, in the short shrift given to the appellant.

Judgment should be reversed and a new trial ordered, with costs to appellant to abide event.

CONLAN and O'DWYER, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

GEORGE W. RYDER, Respondent, *v.* PATRICK DUFFY, Appellant.

APPEAL from judgment upon verdict and order denying motion for new trial.

Benj. G. Paskusz, for appellant.

Hays & Greenbaum (Maxwell Davidson, of counsel), for respondent.

HASCALL, J. It appears to us, from a careful reading of all the testimony, that this appeal should succeed. There was no sufficient proof of ownership in Horan at the time of Ryder's alleged acquisition of the property, or prior thereto; no sufficient proof of demand; no adequate or proper proof of value; no evi-

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dence of the requisites needful to maintain the alleged detention or conversion, to go to the jury. But what of competent evidence there was, on both sides, points to and confirms substantiation of the allegations of the defendant. Plaintiff did not successfully sustain the burden of proof, and, we think, it was error of the learned court below to refuse defendant's motion for nonsuit. Plaintiff's remedy would seem to be against Horan alone.

Judgment should be reversed and the complaint dismissed, with costs of appeal and of action to the appellant.

CONLAN and O'DWYER, JJ., concur.

Judgment reversed and complaint dismissed, with costs to appellant.

CHARLES HERNANDEZ, Respondent, *v.* THE METROPOLITAN STREET RAILWAY COMPANY, Appellant.

APPEAL from judgment entered upon verdict, and from order denying defendant's motion for a new trial.

Henry A. Robinson (John T. Little, Ed. D. O'Brien, of counsel), for appellant.

Weeks, Battle & Marshall, for respondent.

HASCALL, J. It seems to us that the respondent was clearly guilty of contributory negligence, as disclosed by the testimony introduced on his part; that, standing as he did, when hit by the appellant's car, was almost an invitation to accident, and that the verdict, being clearly against the weight of evidence, should have been set aside.

Judgment and order appealed from reversed and new trial ordered, with costs to appellant to abide the event.

CONLAN, J., concurs.

O'DWYER, J. (dissenting). I dissent. The case was one properly for the jury, and their verdict is sustained by a fair preponderance of the evidence, and should be affirmed, with costs.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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THOMAS E. RUSH, Respondent, *v.* MARY KLEIN, Individually and as Administratrix, Etc., of GEORGE GEYER, Deceased, Appellant.

APPEAL from order denying appellant's motion to modify a warrant of attachment.

Menken Brothers (Mortimer M. Menken, of counsel), for appellant.

J. Harry Hull (Chas. W. Ridgway, of counsel), for respondent.

HASCALL, J. Under all the circumstances disclosed by the papers upon which the attachment was founded, and conforming with the dictum of the court in 130 N. Y. 517 *et seq.*, it seems to us that the order must be left undisturbed.

Order affirmed, with costs and disbursements to respondent.

CONLAN and O'DWYER, JJ., concur.

Order affirmed, with costs to respondent.

THOMAS E. RUSH, Respondent, *v.* MARY KLEIN, Individually and as Administratrix, Etc., of GEORGE GEYER, Deceased, Appellant.

APPEAL from order of Special Term, directing compulsory reference of the issues.

Menken Brothers (Mortimer M. Menken, of counsel), for appellant.

J. Harry Hull (Chas. W. Ridgway, of counsel), for respondent.

HASCALL, J. The appellant, by the answer interposed, is in position to contest each item of the plaintiff's claim, thus bringing this case within 137 N. Y. 616, and we, therefore, decide that the order appealed from was properly made.

Order affirmed, with costs and disbursements to respondent.

CONLAN and O'DWYER, JJ., concur.

Order affirmed, with costs to respondent.

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PETER MCCANN, Respondent, *v.* FREDERICK THILEMANN, JR., et al., Appellants.

APPEAL from a judgment entered upon a verdict, and from an order denying motion for a new trial.

Weeks, Battle & Marshall, for appellants.

Robert H. Ernest (Percy W. Crane and J. Aspinwall Hodge, Jr., of counsel), for respondent.

HASCALL, J. This case presents a very close question upon the law — in short, is at the border line. But, while we might possibly disagree with the learned court below in declining to charge all that the appellants requested, yet, upon the whole, we determine that fatal error was not committed by refusal. The case was carefully and impartially presented for the jury's consideration of the facts; and the verdict, in view of the long and continued use of the path by plaintiff and the public, having held the defendant to have been negligent, will be permitted to stand. (68 N. Y. 293.)

Judgment should be affirmed, with costs.

CONLAN, J., concurs.

Judgment affirmed, with costs.

JOHN G. FOLSOM, Appellant, *v.* ELIZABETH WINTERS, Respondent.

APPEAL from judgment entered upon order dismissing the complaint at the close of plaintiff's case at Trial Term.

John M. Ward, for appellant.

No appearance for respondent.

HASCALL, J. We think that no error was committed by the court below that calls for a reversal of the judgment appealed from. The papers excluded did not tend to prove agency and

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none was established. Most of plaintiff's objections and exceptions are entirely without grounds assigned therefor and cannot be considered by us upon appeal, while the others cannot avail as against the inherent weakness of appellant's case.

Judgment appealed from should be affirmed, with costs.

CONLAN and O'DWYER, JJ., concur.

Judgment affirmed, with costs.

EDMUND EXNER, Respondent, *v.* THOMAS O'GARA, Appellant.

APPEAL from a judgment entered upon a verdict in favor of the plaintiff.

Jas. C. Quinn, for appellant.

Chas. W. Philipbar, for respondent.

O'DWYER, J. No order denying the motion for new trial appears in the appeal book, and the appeal must, therefore, be determined solely upon defendant's exceptions taken during the trial, and the only exception called to our attention is that to the ruling upon the question addressed to the witness Boyle. The accident occurred on the 7th day of August, 1899, and was caused by the defective condition of the oil cloth on the stairway in question, and this witness testified that he went with the defendant in September, 1899, the date he did not know, and examined the stairs from the top to the bottom. The record shows the following proceedings: "Q. What did you find as the result of your examination as to the stairway leading from the second to the third story, as to the condition of the oil cloth? [Objected to; objection sustained; exception.] A. I don't know when the oil cloth was put down. It appeared apparently new."

The defendant's liability was to be determined by the condition of the oil cloth previous to and at the time of the accident. Its condition in September, long after the accident, had no relevancy upon the issue, and the ruling of the court was right. There is nothing in the case to show that the oil cloth was in the same condition in September, 1899, as it was on August 7, 1899, or previous thereto. Furthermore, it appears from the testimony

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of this witness that at the time he examined this oil cloth it appeared apparently new.

The exception is without merit, and the judgment must be affirmed, with costs.

CONLAN and HASCALL, JJ., concur.

Judgment affirmed, with costs.

ALESANDRO MALFIT, Appellant, *v.* ISAAC OPPENHEIMER, Respondent.

APPEAL from a judgment entered in favor of the defendant upon the dismissal of the plaintiff's complaint at the close of the plaintiff's case.

Achille J. Oishei (Nelson L. Keach, of counsel), for appellant.

Hippolyte A. Geney, for respondent.

O'DWYER, J. There was sufficient evidence in this case to entitle the plaintiff to have the question of the defendant's alleged conversion of his horse submitted to the jury. The plaintiff testified that at an interview with the defendant, the defendant said to him "Me stole your horse. How much do you want, Mr. Malfit?"

This was an admission by the defendant sufficient to entitle the plaintiff to recover, unless overcome by evidence on the defendant's behalf.

Furthermore, error was committed in excluding the answers to the following questions addressed to the plaintiff: "Q. Did you find out afterwards who took that horse? Q. Did you know what was the value of that horse on July 1, 1898? Q. Was there any money paid on that evening, August 15th, by Mr. Oppenheimer, by order of the defendant? Q. Were you down to the police court at the time he was arrested?"

The other errors assigned need not be discussed, as they may be cured on a new trial.

Judgment appealed from reversed and a new trial ordered, with costs to appellant to abide the event.

CONLAN, J., concurs.

Judgment reversed and new trial ordered, with costs to appellant to abide the event.

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JACOB EPSTEIN, Respondent, *v.* JAMES BROOKS and JAMES F. FEELEY, Appellants.

APPEAL from an order entered at Trial Term granting a motion to set aside the verdict rendered on the trial. The motion was made upon an affidavit accompanying an order to show cause granted by the trial justice after he had denied a motion for such new trial upon the rendering of the verdict.

James A. Lynch (John H. Mulcahey, of counsel), for appellants.

Max D. Steuer, for respondent.

Per Curiam. The action is in the ordinary form for goods sold and delivered. The answer is first practically a general denial; and, second, a specific allegation of an executory contract of sale, in which plaintiff made certain representations as to the condition of the goods offered. It is claimed by the defendants, and so found by the jury, that there never was an acceptance of the goods offered, and the evidence of the defendants is to the effect that the plaintiff called after the delivery of the goods and stated that he would take them away, and did, in fact, put them in condition for removal, and promised to send for them in a day or two. He was subsequently notified to remove them as they were in the defendants' way.

It is somewhat remarkable in this case that no exceptions were taken by the plaintiff to the charge of the trial justice, and, indeed, the only exception by him of any effect is the exception to the refusal to set aside the verdict at the close of the trial.

We have examined the case with care, and have given to it due consideration, and have reached the conclusion that the verdict of the jury was the only proper determination of the issues presented, and that the order setting aside the verdict and granting a new trial was error which calls for reversal.

Order appealed from reversed, with costs, and the verdict and judgment allowed to stand.

Present: CONLAN, HASCALL and O'DWYER, JJ.

Order reversed, with costs.

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SAMUEL HEITLER et al., Respondents, *v.* JOSEPH DICKOFF, Appellant.

APPEAL from an order denying motion to vacate an order of arrest.

Elias Rosenthal, for appellant.

No appearance for respondents.

Per Curiam. Defendant's statement set forth in the affidavit, after having been asked for an explanation, is sufficient proof of the falsity of the representation made and relied upon, and entitles plaintiffs to the order appealed from. The ground of the arrest is fraud, and is sufficiently stated in the order. The complaint sufficiently states the sale and delivery of the goods.

The order appealed from must be affirmed, but in view of the fact that the respondents did not appear on the hearing or file a brief, without costs.

Present: CONLAN, HASCALL and O'DWYER, JJ.

Order affirmed, without costs.

SAMUEL LEWENGOOD, Respondent, *v.* EMANUEL H. KAHN, Appellant.

APPEAL from an order of the City Court of the city of New York, denying defendant's motion for a bill of particulars.

Wasserman & Jacobus, for appellant.

Leo G. Rosenblatt, for respondent.

Per Curiam. We are agreed that the record does not present a case that would justify an interference with the discretion exercised by the court at Special Term, but in view of the fact that the defendant has died since that determination, leave is granted

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to the executors as substituted defendants, to apply anew for a bill of particulars.

Order appealed from affirmed, with ten dollars costs.

Present: CONLAN and O'DWYER, JJ.

Order affirmed, with ten dollars costs.

PHILIP GREENBAUM, Respondent, *v.* FRANK SCHULBERG et al., Appellants.

APPEAL from a judgment entered upon a verdict in favor of the plaintiff, and from an order denying a new trial.

Henry L. Franklin, for appellants.

Miles Rosenbluth, for respondent.

Per Curiam. Reargument ordered at September General Term, and appellants directed to insert in the printed case on appeal the order dismissing the indictment, offered in evidence and marked plaintiff's Exhibit B. If the original exhibit is lost, then the contents must be agreed upon and settled by the trial justice.

Present: CONLAN, HASCALL and O'DWYER, JJ.

Reargument ordered.

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LIST OF DECISIONS — NO OPINIONS.

SUPREME COURT — APPELLATE TERM, JUNE, 1901.

BEFORE SCOTT, P. J., BEACH AND FITZGERALD, JJ.

Joseph Rosaler, Appellant, v. Frank Greenberg, Respondent.— Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, fifth district, borough of Manhattan. Bernhard Ginsberg, for appellant; Abraham B. Schleimer, for respondent. Judgment affirmed, with costs. No opinion.

The Manhattan Hygeia Ice Company, Respondent, v. The People's Co-Operative Ice Company, Appellant.—Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, eighth district, borough of Manhattan. Swayne, Swayne, Morris & Fay for appellant; R. D. Geswein, for respondent. Judgment affirmed, with costs. No opinion.

Thomas F. McLoughlin, Respondent, v. The Metropolitan Street Railway Company, Appellant.—Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, seventh district, borough of Manhattan. H. A. Robinson (G. Glenn Worden, of counsel), for appellant; J. J. Callahan, for respondent. Judgment affirmed, with costs. No opinion.

Isaac Gans, Appellant, v. John Greef et al., Respondents.—Appeal from a judgment rendered in favor of the defendants in the Municipal Court of the city of New York, eleventh district, borough of Manhattan. E. W. Wakelee, for appellant; C. C. Miller, for respondents. Judgment affirmed, with costs. No opinion.

Joseph Goldberg, Appellant, v. The Congregation Acuda Anshei, etc., Respondent.— Appeal from an order of the Municipal Court of the city of New York, fifth district, borough of Manhattan. M. Brown, for appellant; I. A. Hourwich, for respondent. Order reversed, with ten dollars costs. No opinion.

Moses Mass, Appellant, v. Elias Rubin, Respondent.—Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, fourth district, borough of Manhattan. Sands & Wasservogel, for appellant; J. Rieger, for respondent. Judgment affirmed, with costs. No opinion.

Robert L. Stillson, Respondent, v. Charles E. Evans et al., Appellants.— Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, second district, borough of Manhattan. Howe & Hummel, for appellants; H. L. Maxson, for respondent. Judgment affirmed, with costs. No opinion.

The S. F. Hayward & Company, Respondent, v. Leander S. Sire, Appellant.— Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, seventh district, borough of Manhattan. A. I. Sire, for appellant; Donnell & Smith, for respondent. Judgment affirmed, with costs. No opinion.

William H. Brall, Respondent, v. William Clauson, Appellant.— Appeal from an affirmance by the General Term of the City Court of the city of New York of a judgment of the Trial Term entered upon the verdict of a jury. Lamb & Voss (David W. Guernsey, of counsel), for appellant; Jerome Elsner, for respondent. Judgment affirmed, with costs. No opinion.

William Ficklen, Respondent, v. Bernard Moral et al., Appellants.—Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, eleventh district, borough of Manhattan. S. D. Epstin, for appellants; J. G. Lazarus, for respondent. Judgment affirmed, with costs. No opinion.

Clara Dabritz as Executrix, etc., Respondent, v. Benjamin Blum et al., Appellants.— Appeal from a judgment

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rendered in favor of the plaintiff in the Municipal Court of the city of New York, third district, borough of Manhattan. Mooney & Shipman, for appellants; F. L. Drescher, for respondent. Judgment reversed and new trial ordered, with costs, to abide the event. No opinion.

Amasa B. Clark, Respondent, v. Mary J. Moran, Appellant.— Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, eleventh district, borough of Manhattan. M. Steinert, for appellant; C. A. Perkins, for respondent. Judgment affirmed, with costs. No opinion.

Joseph Kennedy, Respondent, v. The Fleischmann Vienna Model Bakery, Appellant.— Appeal from a judgment rendered in the Municipal Court of the city of New York, second district, borough of Manhattan, in favor of plaintiff. Lee & Fleischmann, for appellant; A. Morris, for respondent. Judgment affirmed, with costs. No opinion.

Frank E. Driscoll, Respondent, v. The American Watchman's Time Detector Company, Appellant.— Appeal from a judgment in favor of the plaintiff rendered in the Municipal Court of the city of New York, eleventh district, borough of Manhattan. W. L. Bunnell, for appellant; M. A. Lesser, for respondent. Judgment affirmed, with costs. No opinion.

David Schultz, Respondent, v. Man Berger et al., Appellants.— Appeal from a judgment in favor of the plaintiff in the Municipal Court of the city of New York, fourth district, borough of Manhattan. M. H. Gotlieb, for appellants; A. B. Jaworower, for respondent. Judgment affirmed, with costs. No opinion.

Stanislaus Fekus, Respondent, v. The Metropolitan Street Railway Company, Appellant.— Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fourth district, borough of Manhattan. H. A. Robinson (G. Glenn Worden, of counsel), for appellant; E. Rosenthal, for respondent. Judgment affirmed, with costs. No opinion.

Alwin Eisert, Respondent, v. John C. Barth, Appellant.—Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, tenth district, borough of Manhattan. Lippmann & Ruck, for appellant; W. H. Klinker, for respondent. Judgment affirmed, with costs. No opinion.

Paul C. Schnitzler, Appellant, v. James Stern, Respondent. Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, eighth district, borough of Manhattan. P. C. Schnitzler, for appellant; Hays, Greenbaum & Horwitz, for respondent. Judgment affirmed, with costs. No opinion.

Adolph Cypres, Respondent, v. The Haulenbeek Roasting & Milling Company, Appellant.—Appeal from an affirmance by the General Term of the City Court of the city of New York, of a judgment rendered at a Trial Term of said court. S. G. Adams, for appellant; G. W. McAdam, for respondent. Judgment affirmed, with costs. No opinion.

The Press Publishing Company, Respondent, v. Max Hallheimer, Appellant.— Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, third district, borough of Manhattan. M. Hallheimer, for appellant; Wilber & Hart, for respondent. Judgment affirmed, with costs. No opinion.

Frederick J. Seelig, Respondent, v. Abraham Weiss, Appellant.— Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fourth district, borough of Manhattan. W. R. Adams, for appellant; L. W. Harburger, for respondent. Judgment affirmed, with costs. No opinion.

Marco Petroleo, Respondent, v. The Societa Reduci Delli Patrie, Appellant. — Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, second district, borough of Manhattan. John J. Freschi, for appellant; Aaron Morris, for respondent. Judgment affirmed with costs. No opinion.

William F. B. Rouquette, Respondent, v. William H. Totten, Appellant.—Appeal from a judgment rendered in favor of the plaintiff in the Municpal Court of the city of New York, first district, borough of Manhattan. John J. Buckley, for appellant; Abraham B. Schielmer, for respondent. Judgment affirmed, with costs. No opinion.

Tabitha Dunn et al., Respondents, v. Peter Barry, Appellant.— Appeal from a judgment rendered in favor of the plaintiffs in the Municipal Court of the

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city of New York, eleventh district, borough of Manhattan. D. A. Levien, for appellant; D. M. Neuberger, for respondents. Judgment affirmed, with costs. No opinion.

David T. Jones, Respondent, v. The Third Avenue Railroad Company, Appellant.—Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, seventh district, borough of Manhattan. Hoadly, Lauterbach & Johnson, for appellant; L. G. Spalding, for respondent. Judgment affirmed, with costs. No opinion.

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Samuel J. Kirkman, Appellant, v. The Carlstadt Chemical Company, Respondent.— Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, eleventh district, borough of Manhattan. E. S. Hull, Jr., for appellant; Holt & Duross, for respondent. Judgment reversed and new trial granted, with costs, to abide the event. No opinion.

Domenico Marciero, Respondent, v. The Metropolitan Street Railway Company, Appellant.— Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, first district, borough of Manhattan. H. A. Robinson (G. Glenn Worden, of counsel), for appellant; H. Gottlieb, for respondent. Judgment affirmed, with costs. No opinion.

Hannah Gold, Appellant, v. The Metropolitan Street Railway Company, Respondent.— Appeal from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, fifth district, borough of Manhattan. A. H. Sarasohn, for appellant; H. A. Robinson (G. Glenn Worden, of counsel), for respondent. Judgment affirmed, with costs. No opinion.

Leonard Landes, Respondent, v. Frederick C. Whitney, Appellant.— Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, sixth district, borough of Manhattan. Howe & Hummel, for appellant; W. H. Schnitzler, for respondent. Judgment affirmed, with costs. No opinion.

Anna Holmes, Respondent, v. Simon Feist, Appellant.— Appeal from an affirmance by the General Term of the City Court of the city of New York of a judgment of the Trial Term of said court. J. M. Lathrop, for appellant; Howe & Hummel (Nathaniel Cohen, of counsel), for respondent. Judgment affirmed, with costs. No opinion.

City Court of New York — General Term, May, 1901.

Before Fitzsimons, Ch. J., Delehanty and Schuchman, JJ.

James Morehouse, Respondent, v. The Chatham Electric Light Company, Appellant.— Appeal from judgment entered on verdict of jury and from order denying motion for a new trial. Thomas H. Smith (Henry B. Twombly, of counsel), for appellant; A. M. & G. Card (Edward S. Griffing, of counsel), for respondent. Judgment and order appealed from affirmed, with costs. No opinion.

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2. *Plaintiff, when required to give further security under Code C. P.,* § 682 *— Items recoverable — Laches.*— Whether the court will direct an increase of the security theretofore given by the plaintiff to the defendants in order to procure a writ of attachment against their property, depends upon the question whether the action must be tried in order to get rid of the attachment. Where, therefore, an attachment against non-resident defendants was not assailable and had not been assailed on any statutory ground and the defendants had succeeded in the action up to the Court of Appeals, the court at Special Term increased the amount of the plaintiff's original undertaking from $250 to $4,000 to cover the fees of counsel, sheriff and stenographer already incurred and fees to be incurred in defending the pending appeal to the Court of Appeals, the court considering that the trial and the eventual result of that appeal could alone decide the fate of the attachment — the parties having agreed that the existence of the attachment was not affected by the judgments in favor of the defendants. Such a motion can be made at any time before the application of the attached property, or its proceeds, to the judgment recovered in the action. Ives v. Ellis, 333.

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ATTACHMENT — Continued.
year of contract relations, 600 harmonists at $110 each and taking only 260, causing an alleged loss of profit of about $1,000, and for the vendee's refusal to surrender instruments, orders, plates, lithographs, accounts and contract rights, to the value of $9,500, notwithstanding the vendors had, as alleged, a right to and had cancelled the contract for the vendee's non-compliance with it, did not show that the vendors were entitled to recover any sum certain upon that cause of action. The plaintiffs may properly unite, in one action in which an attachment is sought, all their claims against the defendant under one contract and also those under any other subordinate and incidental contract. Roth v. American Piano Manufacturing Co., 502.

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BANKRUPTCY.

1. *Parties to action by trustee to reach the surplus of a trust fund.*— A judgment creditor of a bankrupt is not a necessary party to an action by the trustee to reach the surplus, as it accrues, of the income of a trust fund created for the bankrupt's benefit, in the absence of any allegations that the trustee is not proceeding with good faith and diligence; and even where the creditor claims that he has a lien on the surplus and that the trustee has none, he will not be permitted to become a party as he will not be bound or injured by the judgment rendered. Smith v. Belden, 113.

2. *Judgment for criminal conversation not discharged — Code C. P.*, § 1268. — A bankrupt, against whom a creditor named in the schedules had recovered a judgment in an action for criminal conversation had with the creditor's wife, is not discharged therefrom by his discharge in the bankruptcy proceedings, as such a judgment is recovered in an action "for willful and malicious injuries to the person or property of another" within the meaning of subd. 2 of § 17 of the Bankruptcy Act of 1898. The bankrupt's motion to have the judgment discharged, made one year after his discharge in bankruptcy, must therefore be denied. Colwell v. Tinker, 330.

3. *Debt not discharged where schedules give creditor's name incorrectly — Code C. P.*, § 1268.— Where the schedules of a bankrupt describe a judgment creditor named George Liesum as George Liesman, the bankrupt's discharge does not release the debt as against George Liesum and therefore the judgment cannot be subsequently discharged of record as against him. Liesum v. Kraus, 376.

4. *Does not release a judgment for breach of promise of marriage, including a claim for seduction under the promise — Code C. P.*, § 1268.— A discharge in bankruptcy does not release a judgment for $3,000 recorded against the bankrupt for breach of promise of marriage where the complaint in that action also alleged seduction under such promise and there was proof that the plaintiff therein had a child, as it may fairly be assumed that a part of the damages were given for the seduction, and seduction is a willful injury to the person, within the clause of the Act of 1898 (chap. 3, § 17), excepting from release judgments recovered "for willful and malicious injuries to the person or property of another." Disler v. McCauley, 411.

5. *Effect of discharge, in State court — "Judgments in actions for fraud" construed — Debt, not scheduled, when not discharged.*— A discharge in bankruptcy is not *per se* an extinguishment of the debt and no court, other than that in bankruptcy, is bound to take notice of it unless it is pleaded as a release. A judgment for money had and received arising out of a transaction by which the judgment creditor, a grantee, lost real estate purchased by her because her grantor, the judgment debtor and voluntary bankrupt, after inducing her to withhold her deed from record, sold the same premises to a third person, is, where her complaint contained no allegations of fraud and fraud was not the gravamen of her action, not within the "judgments in actions for fraud" which the Bankruptcy Act of 1898 (§ 17, subd. 2) declares shall not be released by the discharge. A debt is however not discharged where it has not been scheduled at all and the creditor has had neither notice nor actual knowledge of the bankruptcy proceedings. (§ 17, subd. 3). Collins v. McWalters, 648.

6. *When a discharge releases a judgment for the bankrupt's breach of promise of marriage — His intention going into bankruptcy immaterial.*— A discharge in bankruptcy releases a judgment rendered against the bankrupt for breach of promise of marriage where there was no accompanying seduction nor proof of malice tending to show an attempted injury to character, as, in such case, there is a mere contract debt of record and "no willful and malicious injuries to the person", within the Bankruptcy Act of 1898, § 17, subd. 2. The fact that the bankrupt went into bankruptcy in order to avoid that particular judgment cannot limit the legal effect of his discharge. Finnegan v. Hall, 773.

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BANKS.

National — Remedy of stockholder sold out for an assessment made necessary by the misconduct of directors — Duty of directors — Statute of Limitations.— A former stockholder in a national bank, presently solvent, whose stock has been sold out by the bank for his failure to pay an assessment thereon made necessary by the negligence or misconduct of its directors in loaning its funds to irresponsible parties, may maintain, for himself and all others similarly situated, an equitable action against the bank, and the directors who permitted or caused its loss, to make the directors account to and pay him the value of his stock, as it stood before the acts of negligence or misconduct. While ordinarily the action should be brought by the corporation against the delinquent directors, this need not be when the managing directors are the ones charged with misconduct. The directors of such a bank must exercise a reasonable supervision, but where they appoint from their number a discount committee and an examining committee, they shift the responsibility to the members of such committees; and when during three years such committees permit the cashier of the bank to discount notes, for a mere dealer in cheap musical instruments, taken by him from purchasers not known or shown to be responsible, and which notes are frequently protested or renewed, to such an extent that his discounts finally cover two-thirds of the bank's capital, a condition of negligence or misconduct upon the part of the members of the committees is presented which makes them liable to stockholders injured thereby. The Statute of Limitations applicable to such action is ten, and not three, years. Hanna v. People's National Bank, 517.

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BENEFIT SOCIETIES.

1. *Membership — Status of a director in a corporation.*— A director of a corporation manufacturing and selling malt liquors is not within the prohibition of the laws of a fraternal order making ineligible to membership therein any person who "is engaged either as principal, agent or servant in the manufacture or sale of * * * malt * * * liquors as a beverage," as a director is in no sense the principal, agent or servant of his corporation in the transaction of its business. People ex rel. Kuefer v. Supreme Tent, 424.

2. *Survivorship, where husband and wife die together — Interest of beneficiary in death benefit an expectancy — Funeral expenses not a lien — State control of foreign corporation — L.* 1892, *ch.* 690, §§ 233, 238.— Where a husband and second wife die in the same night from being poisoned by the escape of natural gas from a stove in their room, there is, in the absence of any evidence upon the point, no presumption that one survived the other. The interest, in a death benefit, of the beneficiary is a mere expectancy which is subject to be defeated by a failure to survive the insured. Where a second wife and her husband occupying the relations of beneficiary and insured to a fund, shown by the certificate of incorporation, constitution and by-laws of the insuring corporation, to be intended for the widow, children, relatives or dependents of the insured, died in the same night, it was held that no interest in the fund ever vested in her or in her next of kin, and that, under provisions of the policy controlling distribution in a case where the designation made by the insured failed "for illegality or otherwise", the fund passed to the children of his first marriage. The funeral expenses of the husband and second wife, paid by the administrator of her next of kin, are not a legal charge upon the fund. A foreign corporation lawfully doing business in the State of New York is subject to such of its laws as govern similar domestic corporations. Southwell v. Gray, 740.

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BILL OF PARTICULARS.

Negligence — Affidavit.— Where the defendant, in an action for negligence based on a collision of its freight trains, seeks by a bill of particulars to dis-

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BILL OF PARTICULARS — Continued.
cover the persons intended by the plaintiff's allegations that the defendant wrongfully and negligently failed to provide one of its servants with competent temperate co-employees and with a sufficient number to handle its train and cars, the plaintiff must furnish the defendant with the names and positions of those employees whose competency it is proposed to attack. An attorney for a corporation may make an affidavit as to the necessity for a bill of particulars where he gives a sufficient reason why an officer of the corporation did not make it. Field v. New York Central & Hudson River R. R. Co., 111.

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2. *Union free school district — Validity of its bonds — Sales at par and for cash — Printed bonds substituted for typewritten.*— A union free school district may under the statute (L. 1895, ch. 273, § 10) lawfully issue bonds to buy a site for a school and a schoolhouse already erected thereon, and the fact that a very small part of the purchase price represents property, not properly school property, will not invalidate the entire issue of the bonds, in the hands of a *bona fide* purchaser. Where the agent of a private society owning a schoolhouse, its site and fixtures, bid off the bonds at public auction at par and then went with a representative of the union free school district to a bank, which furnished the purchase money, and the agent of the society went through the form of tendering and paying to the said representative said money as the price of the bonds, and the agent of the school district then tendered and paid back to the said representative the same money and thereupon received a deed of the site, the court considered that the statute, as to sales at par and for cash, had been satisfied and that the bonds had a legal inception. Where such bonds, originally written upon a typewriting machine and executed by officers of the union free school district, were declared by brokers unmarketable in that form, and, after mutilation, were replaced by printed bonds of the same tenor and execution, the court considered that the printed bonds were valid and that the officers of the school district had not exhausted their powers when they executed the typewritten set — it appearing that the mutilated bonds had never been presented for payment. Oswego City Savings Bank v. Board of Education, 540.

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2. *Commissions.*— When a real estate broker finds a responsible purchaser whom the principal accepts, the latter must pay the broker his commissions, and cannot dismiss him capriciously and without payment because, for some unexplained reason, the principal became dissatisfied with the purchaser during subsequent negotiations had with him. Miller v. Barth, 372.

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BUILDING AND LOAN ASSOCIATIONS.

Consideration — Void promise of building association to release a shareholder.— An agreement, made by a building and loan association with the maker of a note held by it and accompanied by a pledge of his shares not fully paid, under which it agrees to cancel the note and relieve him from personal responsibility thereon by charging the note up against the amount payable upon his stock, which had been filed by him for withdrawal, when shown to have been made at a time when the association had no funds to pay the withdrawal value and when there were many other similar applications entitled to prior consideration and payment, is without consideration; if enforcible, would constitute a fraudulent preference and, therefore, presents no defense to an action on the note brought by an assignee of the association. Cobb v. Johnson, 109.

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CITY OF NEW YORK.

1. *Commissioners of estimate — Awards.*— Commissioners of estimate and assessment are not concluded as to the value of premises by the testimony of experts but may act on their own personal view of the premises. Where a fee is taken by legislative authority the owner is entitled to a substantial award, even though other parties have easements in the land taken. Matter of Trinity Avenue, 56.

2. *Commissioners of estimate — Awards.*— Where owners of land taken by a city litigate before a commissioner of estimate and assessment without objecting to him and he thereafter makes affidavit that he had disposed of any property owned by him within the area of assessment before the filing of the final report, an objection to his competency to act comes too late when taken on confirmation of the report. An owner of land taken by a city under legislative authority is entitled to a substantial award although other parties have easements in the land. An award is not substantial where the difference between the value given by the witnesses and the award indicates that the commissioners must have mistakenly considered the land subject not only to private but also to public easements. Where a city destroys buildings erected on land, with the consent of owners of private easements therein, once shown on a map as a street but which has ceased to be such because it was neither

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CITY OF NEW YORK — Continued.
opened nor worked as such within six years from the filing of the map, the city must make the owner of the buildings a substantial award. Matter of Summit Avenue, 59.

3. *Assessment for benefit — Inequitable rule of apportionment — L.* 1897, *ch.* 378, § 980.— Condemnation proceedings taken by the city of New York, in which the preliminary report of the commissioners was filed after Jan. 1, 1898, are governed by the new charter (L. 1897, ch. 378), and consequently the commissioners may, under section 980 thereof, assess premises, along the line of the improvement, for benefit to the extent of one-half their value as valued by them and are not now limited, as formerly, to one-half the value as valued by the city tax commissioners. Where an inspection of the report of commissioners of assessment indicates that their rule of apportionment for benefit is irrational and inequitable, their report must be sent back for revision and correction. Matter of Townsend Avenue, 65.

4. *Public school janitor's salary — His personal assistants should not be shown on the payroll.*— The names of persons whom a regularly appointed janitor of a public school of a borough of the city of New York employs at his own expense to help him sweep and scrub should not be carried on the monthly payroll, although the secretary of the city civil service commission has required this to be done; but the mere presence thereon of such names does not justify the city board of education in refusing to pay the janitor his monthly salary where the roll shows him to be a janitor and states his yearly compensation as well as the amount presently due him from the city. Matter of Dowling v. Palmer, 316.

5. *Time of filing objections to report of commissioners of estimate — "Plottage" defined and considered — Amount of award — When it may be made to unknown owners.*— Sundays must be included in computing the ten days, after the first publication of the notice of the deposit of the report of commissioners of estimate of the city of New York, within which objections thereto must be filed under L. 1897, ch. 378, § 1440. The added value which an entire plot has, as against the aggregate value of the several lots which compose it, is known as "plottage". In estimating "plottage", the fact that existing improvements may have to be destroyed by the owner in order to adapt the plot to a new use cannot properly be considered or deducted. The amount of an award is in the commissioners' discretion and will not be reviewed unless grossly inadequate or excessive. Where the commissioners are in doubt as to the title of a lot, their award may be made to unknown owners. Matter of Armory Board, 548.

See Civil Service; District Attorney; Easement; Nuisance; Police; Tenement Houses.

CITY OF TROY.

Status of department of public instruction — Mayor's power of removal — L. 1898, *ch.* 182, §§ 49, 482.— The department of public instruction in the city of Troy is governed by chapter 80 of the Laws of 1892, under which it was organized and by the provisions of the city charter except where those statutes are inconsistent with the charter for cities of the second class. The mayor of Troy has power, under the latter charter (L. 1898, ch. 182, § 49), to remove at pleasure a school commissioner, made by the city charter a city officer, and the provisions of the city charter giving the power of removal to the common council are repealed because inconsistent with the power of removal given the mayor by the charter for cities of the second class. People ex rel. Morrisey v. Boland, 117.

CITY COURT OF NEW YORK.

Consolidation of Municipal Court action — Code C. P., §§ 817, 818, 3347.— The City Court of the city of New York has power to remove to itself and consolidate with an action pending in it an action brought in the Municipal Court

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CITY COURT OF NEW YORK — Continued.
of said city, and should exercise the power where the parties in both actions are the same, the causes of action identical, arise out of the same transaction, are provable by the same evidence and are contested upon the same defenses. Curley v. F. & M. Schaefer Brewing Co., 131.

See Appeal; Calendar.

CIVIL SERVICE.

1. *New York city — A deputy city clerk thereof may be summarily removed — L.* 1892, *ch.* 681, § 9; 1897, *ch.* 378, §§ 31, 32, 33, 1543; 1899, *ch.* 370, § 21.— The city clerk of the city of New York may summarily remove and discharge a deputy city clerk, appointed as such and assigned to the borough of Queens, although the deputy, being alone in the office, did all its work, general and clerical, performed all its other duties and was made by the city clerk caretaker of the records and papers of that particular office. The deputy does not by the performance of these duties become a clerk entitled to the protection of the civil service regulations but remains at all times a deputy and, as such, is not protected from summary removal by any statute, even though he be an exempt fireman. People ex rel. McGraw v. Scully, 613.

2. *Status of bath attendant — Compensation.*— A bath attendant of the city of New York receiving three dollars a day is to be classed in schedule F of the classified civil service; he cannot be removed peremptorily, and where his place has not been filled he can recover his wages where he, although ready to serve, was prevented from so doing by his superior officer. It was held, however, that, as the season for bathing closed with September and as his appointment was in its nature temporary, he could not recover wages after October first. Holt v. City of New York, 642.

CODE OF CIVIL PROCEDURE.

§ 6. People ex rel. Donohue v. Walton, 320.
§ 500. Burkert v. Bennett, 318.
§ 501, subd. 1. Marshall v. Friend, 101.
§§ 507, 508. Burkert v. Bennett, 318.
§ 605. Melody v. Goodrich, 138.
§ 682. Story v. Arthur, 244.
§ 682. Ives v. Ellis, 333.
§ 791, subd. 8. Marsh v. Standard Structural Co., 381.
§ 817. Mason v. Evening Star Newspaper Co., 77.
§§ 817, 818. Curley v. F. & M. Schaefer Brewing Co., 131.
§ 829. Matter of Rose, 21.
§ 829. Matter of Neil, 254.
§ 829. Podmore v. Seamen's Bank, 379.
§ 829. Mertens v. Wakefield, 501.
§ 835. Mertens v. Wakefield, 501.
§ 870 *et seq.* Clark v. Ennis, 339.
§ 942. Grant v. Birrell, 768.
§ 997. Solowye v. Hazlett, 197.
§ 1268. Colwell v. Tinker, 330.
§ 1268. Liesum v. Kraus, 376.
§ 1268. Disler v. McCauley, 411.
§ 1335. Howley v. Kraemer, 444.
§§ 1376, 1377. Matter of Armstrong, 327.
§ 1395. Matter of Liddle, 173.
§ 1678. Irving Savings Institution v. Robinson, 449.
§ 1757, subd. 2. Rixa v. Rixa, 227.
§§ 1790, 1792. Hallett v. Metropolitan Messenger Co., 669.
§ 1822. Matter of Browne, 362.
§§ 1835, 1836. Matter of Ingraham, 577.
§ 1919. Messler v. Schwarzkopf & Dorer, 72
§ 1919. Peckner v. Webb, 291.
§§ 1942–1944. Matter of Browne, 362.

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CODE OF CIVIL PROCEDURE — Continued.
§ 1904. People ex rel. Monticello Telephone Co. v. Board of Trustees, 675.
§ 2471a. Matter of Brenner, 212, 306.
§ 2481, subd. 6. Matter of McManus, 678.
§ 2561. Matter of Ingraham, 577.
§ 2718. Matter of Browne, 362.
§ 2743. Matter of Browne, 366.
§ 2793, subd. 3. Matter of Grotrian, 257.
§ 2818. Yates v. Thomas, 552.
§ 3050. Howley v. Kraemer, 444.
§ 3228. Young v. Syracuse, Binghamton & New York R. R. Co., 114.
§ 3256. Young v. Syracuse, Binghamton & New York R. R. Co., 114.
§ 3347. Curley v. F. & M. Schaefer Brewing Co., 131.
§ 3360, subd. 3. Matter of Meagher, 601.
§ 3369. Matter of Meagher, 601.

CODE OF CRIMINAL PROCEDURE.
§ 270. People v. Neidhart, 191.
§ 308. People v. Fuller, 189.
§ 344. People v. Scannell, 558.
§ 684. People v. Russell, 765.
§ 685. People v. Haven, 590.
§ 901. People ex rel. Keller v. Powers, 775.
§ 966. People v. Scannell, 558.

CODICIL.
See Will.

COMMISSIONS.
See Executors and Administrators.

CONDEMNATION PROCEEDINGS.
1. *Assessment of fee damages must be of the date of the award.*— An assessment of fee damages must be of the date of the award, and where the report of the commissioners found the damages as existing at a date nearly a year prior to the award the court refused to confirm the report. Matter of Manhattan R. Co. v. Comstock, 325.

2. *Petition insufficiently showing the "necessity" of acquiring lands for a public park — Code C. P., §§ 3360, subd. 3; 3369.*— Under the Code provisions requiring the petition in condemnation proceedings to allege "The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use", allegations, upon the part of the city, that the property to be taken is required for public park purposes and that the people in that section of the city are desirous of a place to beautify their section and a place for recreation, are insufficient to authorize condemnation, even where no answer has been interposed. The petition should also show the situation of the neighborhood, the extent of the population there, the fact, if it be so, that there is no other or sufficient place for the recreation of the people of the section and such other facts as may bear upon the necessity of the use for public purposes of the land proposed to be taken. Matter of Meagher, 601.

See City of New York; Water Companies.

CONSTITUTIONAL LAW.
1. *Crimes — Sale of railroad tickets — Unconstitutionality of L. 1901, ch. 639.*— Chapter 639 of the Laws of 1901, prohibiting the sale of railroad tickets by any one not employed by a railroad company nor duly authorized by such a company to sell them, is substantially the same in this particular with chapter 506 of the Laws of 1897 which has been declared unconstitutional by the Court of Appeals, and therefore a conviction under chapter 639 of the Laws of

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CONSTITUTIONAL LAW — Continued.

1901 for a sale made by one, neither employed by such a company nor authorized to sell tickets, cannot be sustained. People ex rel. Weil v. Hagan, 155.

2. *Stay of an order requiring delivery of the books and papers of an office to a claimant, under Code C. P., § 2471a — Semble, that L.* 1901, *ch.* 602 *is unconstitutional — Duties thereunder ministerial — Commissioner of jurors of Kings county not an adjunct of the Supreme Court — Manner of his appointment — "Hereafter", in a Constitution, construed — Consts. of* 1846 *and* 1894, *art. X, § 2.* — Section 2471a of the Code of Civil Procedure, relative to compelling delivery of the books and papers of an office can be invoked only by a claimant who has an unquestionable *prima facie* legal title to the office; and therefore where a grave constitutional question existed as to the legality of the claimant's appointment the court stayed an order, requiring the incumbent to deliver him the said books and papers, until the constitutional question should have been decided on the incumbent's appeal. *Semble*, that chapter 602 of the Laws of 1901, relative to the appointment of a commissioner of jurors for Kings county, is unconstitutional not only because it authorizes justices of the Supreme Court to appoint to a county office, and one which the said statute recognizes as still existing, but also because the statute shortens the term of the office. That the duties thereby imposed upon the justices are ministerial and not judicial and that in appointing the claimant the justices did not judicially determine that the statute was constitutional. That the duties of commissioner of jurors of Kings county belonged, under the Revised Statutes, to the county clerk of the county, were transferred by the Legislature in 1858 to a commissioner of jurors appointable by certain county officers, and that the office had since continued to be a county office whose incumbent must be appointed by county officers. That the office was not a "local" one in any sense which could affect the manner of appointment to it, and that it was not an adjunct of the Supreme Court in such a sense as to make it incapable of being a county office. That, assuming that the said statute created a new office and abolished the old, section 2 of article X of the Constitution of 1894 impounded and protected the duties of the office (constituting the office itself), and made it impossible for the Legislature to transfer them to a new officer, not elected, and not appointed in the manner prescribed by the Constitution of 1894. That where the word "hereafter" occurred in a new and complete Constitution, like that of 1894, it should be construed as meaning after the time of the adoption of that Constitution, and that consequently the contention, that the said constitutional provision was to be construed and applied as of the time of its first adoption in 1846, thus bringing the said commissioner of jurors, created in 1858, among "officers whose offices may hereafter be created by law," and leave the Legislature free to direct the manner of his appointment, was untenable. Matter of Brenner, 306.

3. *Schools — Right of Rochester board of education to pay salaries to teachers in a local orphan asylum — Constitution of* 1894, *art. VIII, § 14; art. IX, § 4; L.* 1894, *ch.* 556, *tit.* 15, *art. XII; L.* 1898, *ch.* 660. — An orphan asylum, giving instruction to the inmates as an incidental purpose but giving no religious instruction to them during school hours, is not a "school or institution of learning" within section 4 of art. IX of the Constitution of 1894 forbidding the State or any subdivision thereof from aiding or maintaining, by its property, credit or by public money, a school or institution of learning in which any denominational tenet or doctrine is taught. Where such an orphan asylum, located in Rochester, is subject to the rules and regulations of the common schools of the State and to visitation by the State board of charities, the city board of education may, as agent of the city, under the authority of section 14 of article VIII of the said Constitution, that of the Consolidated School Law, and that of its charter, pay salaries of teachers of the asylum out of moneys raised by the city by direct taxation. Sargent v. Board of Education, 321.

See **Office and Officer.**

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CONTEMPT.

Alimony not discharged in bankruptcy — Poverty of defendant not an excuse for his failure to pay.— A discharge in bankruptcy does not discharge the bankrupt's liability to pay alimony, whether accrued at the time of filing the petition or accruing thereafter. A defendant who has refused to pay alimony awarded against him by a decree in an action for an absolute divorce cannot excuse the contempt by showing that his pecuniary circumstances are such that he cannot make the payments decreed to be made. Young v. Young, 335.

CONTRACT.

1. *Construction — Time.*— The plaintiff contracted to insert the defendants' advertising card in certain street cars for a term of twelve months commencing December 1st, 1899, and the right was also reserved to the defendants to discontinue the contract at the end of three months by giving the plaintiff thirty days previous written notice and paying twenty-five dollars per month additional. Held, that the last day for giving notice of discontinuance was Jan. 30, 1900. That, in the absence of any proof thereof, it was erroneous for the court to submit to the jury the question whether the time for giving notice had been extended by consent or acquiescence. Railway Advertising Co. v. Posner, 285.

2. *When entire — Agency.*— Where a father permits his son to contract for a year's tuition, the father is liable to the instructor for the whole fee in case the son leaves the school of his own motion before the end of the year. Center v. Rush, 294.

3. *Sale — Refusal to accept an installment of an entire contract — Rescission.*— Where the contract for a sale of goods is entire, the vendee's refusal to accept an installment of the goods is a breach which entitles the vendor to rescind. Ganser v. Weber, 303.

4. *Municipal contract — City cannot forfeit it where the city is in default — Condition against assignment — Stipulation.*— Where a course of dealing between a city and a contractor with it has established a practice of the city's measuring up his work monthly, certifying to it, and paying seventy per cent of it in the succeeding month, the city cannot, where the contractor is proceeding properly, delay measuring up the work, neglect to make him the usual monthly payment within the month necessary to enable him to continue the work, and thereafter declare the contract abandoned for his unnecessary delay. In such case the contractor is, without further performance, entitled to recover of the city the entire amount he had earned up to the time of the city's breach. A clause in such a contract forbidding assignment of it unless the commissioner of street improvements consents thereto in writing is to be considered as one for the city's protection against an assignee, and is available to it only and only when pleaded by it. Therefore, where the contractor took an assignment of the whole contract from his former partner therein and thereafter assigned the thirty per cent, held in reserve by the city, to a bank as collateral security for his own discounted note, the court considered the clause inapplicable to a case in which it had already found that the reserve belonged to the contractor, and it further held that the assignment to the bank, being prior in time to certain other liens filed, entitled the bank to a preference to the extent of the moneys assigned. A stipulation of attorneys for lienors as to the distribution of the surplus, remaining after the bank had been paid, should be given effect. Episcopo v. Mayor, 623.

See Deeds; Evidence; Fraud; Husband and Wife; Insurance (Fire); Mechanic's Lien; Partnership; Pleading; Services; Specific Performance.

CONTRIBUTORY NEGLIGENCE.

See Negligence.

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CONVERSION.

Demand, when unnecessary.— Where the owner of a building orders materials, which have been sold and delivered by third parties to his builder upon an antecedent condition of payment which the builder has not performed, to be affixed to the building and pays for the work, he has exercised an act of dominion over materials not lawfully in his possession which makes him liable in conversion to the owners of the materials without demand upon their part. Schechter v. Watson, 43.

CORPORATIONS.

1. *Public policy condemns a directors' agreement to wind up an insolvent fire insurance company without application to the court — Agreement not enforcible in equity by the other party having notice of insolvency.*— Where the board of directors of an insolvent fire insurance company having creditors passes a resolution to reinsure its risks, liquidate its affairs, or sell a majority of its stock, and thereafter accepts a proposition from another corporation to buy a majority of the stock and liquidate the affairs, the agreement is void as against public policy as a scheme to annihilate the fire insurance company without dissolution proceedings as required in such case by the Insurance Law (L. 1892, ch. 690, § 41). Equity, therefore, will not assist the purchasing corporation, having knowledge of the impairment of the capital and of the existence of outstanding fire losses of its vendor, to recover of a mere stockholder thereof, who accepted and was paid its offer to buy his stock, the payment, upon the ground that the vendor's statement to its stockholders of its financial condition and of the fact that all its risks had been reinsured, relied upon by the purchaser, was false and that the stock was either wholly worthless or was worth much less than the purchaser paid for it. L. D. Garrett Co. v. Morton, 10.

2. *Tort against, not actionable by a minority stockholder as an individual — Parties — Demurrer to complaint.*— A minority stockholder cannot as an individual maintain an action for damages his stock sustained by the defendants' tortious acts in improperly procuring and forcing (with the consent of a majority of the stockholders) the foreclosure of a mortgage upon the property of his corporation to the end that the defendants might gain control of it — the foreclosure resulting in greatly reducing, if not annihilating, the value of the plaintiff's stock — as the primary injury has been done to the corporation foreclosed, the injury to its stockholders is derivative and suffered under it, and the plaintiff's injury is not peculiar to him but is shared by all the other stockholders. The primary right to sue is in the corporation foreclosed and, where it refuses to sue, it is a necessary party to an action brought on behalf of all others similarly situated to procure the relief which the corporation refuses to seek. Niles v. New York Central & Hudson River R. R. Co., 69.

3. *Limited powers of treasurer.*— The treasurer of a corporation has only limited powers and cannot bind it for work, labor and services, as such a contract is beyond the scope of the duties of his office. Connell v. Ernst-Marx-Nathan Co., 133.

4. *Stockholders' liability to its attorney — Their statutory liability to creditors — Amounts unpaid on stock cannot be reached by creditors — Rights of creditor suing for all others — L. 1892, ch. 688, § 54; Code C. P., §§ 1790, 1792.*— Section 54 of the Stock Corporation Law does not make the stockholders of an insolvent stock corporation personally liable to its unpaid attorney upon the ground that he is one of the "laborers, servants or employees other than contractors" of the corporation; as the attorney is not within these classes and is merely an ordinary creditor. The statutory liability to creditors thereby imposed upon stockholders to the amount of their stock, in a case where the capital stock outstanding at the time the debt was contracted has not been fully paid, is not avoidable by a stockholder although he did not actually subscribe for the stock and it was issued to him without full payment. The right of the creditor to recover his debt of the stockholder differs

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CORPORATIONS — Continued.
from the right of the corporation to recover of him the amount unpaid upon his stock in that the latter right remains in the corporation, its receiver or general assignee; therefore a creditor cannot reach amounts unpaid upon the stock. Where the capital stock of an insolvent corporation has not been fully paid and it has sufficient solvent defendant stockholders to pay the debt of a plaintiff creditor, who by his assignee sues as well for all others similarly situated, and no other creditors are or have made themselves parties to the action, the court will not attempt to reach and impound therein all possible assets of the corporation nor will it make its general assignee, theretofore created, account, but will impose the creditor's debt on the solvent defendant stockholders in proportion to the amounts of their stock. Hallett v. Metropolitan Messenger Co., 659.

See **Negotiable Instruments.**

COSTS.

1. *Where non-suit is reversed and judgment absolute is given the plaintiffs in the Court of Appeals — Code C. P.*, §§ 3228, 3256.— Only one trial fee can be taxed by the plaintiffs where they are non-suited on the trial, the decision reversed by the Appellate Division, the latter decision affirmed by the Court of Appeals and judgment absolute there given the plaintiffs on a stipulation to that effect. In such case a subsequent assessment of damages is not a trial, but clerks', jurors' and witnesses' fees are taxable thereon. Young v. Syracuse, Binghamton & New York R. R. Co., 114.

2. *Against defeated claimant of a foreclosure surplus.*— Where a second mortgage, under which the mortgagee named therein claims a surplus resulting from the foreclosure of a prior mortgage, is found by a referee in the surplus money proceeding to be fraudulent as to judgment creditors of the mortgagor, and the said surplus is insufficient to pay their claims, the second mortgagee will be charged personally with the costs of the proceeding. Bemus v. Thrall, 137.

3. *Taxation where there was a disagreement and a second trial.*— Where the jury disagree on the first trial of a case and the plaintiff succeeds on the second, she is entitled to tax two items for costs after notice of trial. Friedheim v. Metropolitan St. R. Co., 199.

4. *In City Court of New York for failure to try a case, on the short cause calendar, within one hour.*— Where a case on the short cause calendar of the City Court of the city of New York is not tried within one hour and, consequently, is ordered to the general calendar, the trial court may impose upon the party, who put the case on the short calendar, reasonable costs for failing to complete the trial within one hour. Barry v. Winkle, 209.

5. *Not affected by withdrawal of juror.*— The withdrawal of a juror during the progress of a trial at the request of a party does not affect the right of the successful party to tax a trial fee. Browning v. Goldman, 272.

6. *On established disputed claim referred by consent to the surrogate — Code C. P.*, §§ 1822, 1835, 1836, 2561.— Where a disputed claim against a decedent's estate is referred by consent to the surrogate and is heard by him upon the judicial settlement, costs to the successful claimant are discretionary, their amount must be within the limits prescribed by Code C. P., § 2561, and should be determined upon the principles which govern the allowance or disallowance of costs in actions at law against such estates. A claimant, not entitled to be cited as heir at law or next of kin, becomes a party to the proceeding by presenting his claim and filing a consent, but, nevertheless, should not be awarded costs against the estate or its administrator where the latter's resistance of the claim results in the surrogate's reducing it seventy-five per cent. Matter of Ingraham, 577.

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COSTS — Continued.
7. *On reversal by Court of Appeals "with costs."*— An order of the Court of Appeals, reversing orders of the successive courts below, "with costs" covers costs in the Court of Appeals only. People v. Mercantile Credit Guaranty Co., 755.
See Criminal Law; Surrogate's Court.

COUNTERCLAIM.
See Pleading.

COURT OF APPEALS.
See Costs.

COURT OF GENERAL SESSIONS.
See Indictment.

CREDITOR'S ACTION.
1. *Fraudulent preference — Books not produced — Debtor's subsequent voluntary bankruptcy.*— Circumstances sufficiently showing that a transfer made by a failing debtor to his father-in-law, when taken in connection with the acts of the latter in the premises, was not an honest preference to a just debtor, within our statute. The failure of both parties to produce or account for the absence of their books of account is a suspicious circumstance. Where defrauded creditors of the debtor have timely begun an action to set aside the transfer, their equitable lien cannot be affected by the debtor's subsequently taking proceedings to have himself declared a bankrupt, as his trustee takes only the residuum. Iselin v. Goldstein, 489.

2. *Based on the costs of a former similar action — Execution — False return must be pleaded.*— A creditor of the son of the defendant Eli Smith, aged seventy years, brought an action to set aside, as fraudulent as to creditors, a deed from the son to the father, and during the trial the father, in order to avoid payment of any judgment which might then be recovered, conveyed some land of little value, constituting, however, all his property, to his wife, the defendant Lavina Smith, reserving to himself a life estate therein. The creditor succeeded in that action and, among other things, recovered against Eli Smith personally a deficiency judgment for the costs and disbursements, upon which execution was issued and returned unsatisfied. Upon the basis of that judgment the creditor then brought this action, and alleged that the transfer from Eli to Lavina was fraudulent as to creditors. Held, that the action was maintainable although its only basis was the costs and disbursements of the former action in equity — which had not ripened into a liability at the time of the transfer from Eli to Lavina but subsequently became a debt. *Semble*, that it was not necessary for the creditor first to sell the life interest of Eli in the land, as that interest appeared to be worth only a few dollars, and further, that if the sheriff's return, of no property, was untrue, that fact should have been pleaded as a defense. McLaggan v. Smith, 564.

CRIMINAL LAW.
1. *Assignment of counsel on a charge of murder — Code Crim. Pro., § 308.*— The court will not permit a destitute defendant, charged with murder in the first degree, to have any share in selecting the counsel to be assigned him by the court and paid by the county under Code Crim. Pro., § 308. *Doubted*, whether under the statute the court can allow compensation to counsel assigned to such defendant after arraignment, or unless assigned upon arraignment. People v. Fuller, 189.

2. *Receiving stolen goods — New trial for newly-discovered evidence.*— Where the course of a trial before a magistrate of a charge of receiving a violin knowing it to have been stolen, upon which trial the defendant was acquitted, as well as the nature of the evidence given upon a subsequent trial of an indictment for the same offense — at which trial admittedly the stolen violin was not produced and another was — indicated that the identity of the violin was

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CRIMINAL LAW — Continued.
a main issue of the second trial, the Court of General Sessions considered that evidence, discovered after the defendant had been convicted upon the indictment, establishing beyond question the fact that the stolen violin had been found, accompanied by its production in court upon a motion for a new trial, justified the granting of the same, where the new evidence also tended to prove that the violin had been found under circumstances which, if true, precluded the possibility of the defendant's having had it in his possession at the time of his arrest. It is discretionary with a criminal court whether it will grant a new trial. People v. Fletcher, 779.

See **Constitutional Law; Evidence; Indictment; New Trial; Sunday.**

DAMAGES.
1. *Municipal contractor — Liability to an individual.*— Contractors with a municipality who are engaged on an important public work upon which it is necessary temporarily to use power, machinery, tools, and men are not liable in consequential damages to an individual, alleged to have been damaged thereby, unless it appears that the work has been negligently or unskillfully performed or that there has been an unreasonable encroachment upon private rights. Bates v. Holbrook, 342.

2. *Replevin — Counsel fees and traveling expenses not recoverable.*— Counsel fees, and the traveling expenses of the president of a corporation made necessary by the litigation, are not recoverable by the corporation as damages in an action brought by it to recover certain of its personal property and damages for its unlawful detention. Hampton & Branchville R. R. & Lumber Co. v. Sizer, 391.

3. *Measure of — For agricultural lands on Long Island deprived of natural water by Brooklyn pumping system — Special damages — Injured person to make loss small as possible — Fraud.*— In an action for damages caused to Long Island agricultural lands by the lowering of their water level through the action and suction of the pumping system of the borough of Brooklyn, the measure of general damages is the difference between the reasonable value of such lands with and without their natural water. The rental value is not a proper measure of damages where lands are not commonly rentable. Special damages may be recoverable but are dependent on the circumstances of each case. Where a pumping system has been in operation for many years and has affected such lands permanently and injuriously, their owner is not justified in continuing to work them, and then attempt to make the city of New York pay him special damages for the labor, skill and expenses of cultivation which he lost during all the years of cultivation for which recovery was possible. Excluding the value of the labor and skill of the owner and adding taxes, the value of the annual use of such lands is somewhere between three and five per cent. of the sale value, and, accordingly, where the owner of such lands, worth $6,500, claimed damages of the city of New York for $75,000, the court considered the claim untenable and as indicative of fraud. Reisert v. City of New York, 413.

4. *Measure of — For market garden lands deprived of natural water by the Brooklyn pumping system — Injured person must make the loss as small as possible.*— An owner of four and one-half acres of land in Kings county, provided by him with ditches securing a degree of moisture proper for market gardening, is not and cannot be entitled to recover $20,000 for seven years' loss of crops, caused as alleged by the installation in 1894 of the driven well system of the former city of Brooklyn; nor, where his crops have thereafter annually failed to mature, is he justified in continuing to put them in and then seek to make the city of New York, after consolidation, pay him the accumulated loss. Upon the proof the court awarded $1,200 damages for loss of crops and refused an injunction. Jager v. City of New York, 622.

See **Carriers; Condemnation Proceedings; Easement; Injunction; Negligence; Railroads; Watercourses.**

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DECEDENTS' ESTATES.

1. *Exemption — Realty purchased with pension money not exempt from the pensioner's debts after his death — Code C. P., § 1395 — Services rendered to a decedent in the family relation.*— The exemption afforded real property, purchased with pension money, from levy and sale for payment of debts does not extend beyond the life of the pensioner; and therefore where he dies leaving such real property as the only fund for the payment of his debts and his will directs their payment, the real property may be sold to pay them. Claims against a decedent's estate made by relatives for services rendered him in the family relation must be clearly established in order to be allowed payment. Matter of Liddle, 173.

2. *Payment of claim against, an affirmative defense — Code C. P., § 829.— Statute of Limitations.*— The rule that payment is an affirmative defense applies to a claim for rent of premises occupied by an intestate and, upon a contest in regard to the claim, the claimant need not show that no payments have been made him thereon. An administrator, claiming as a creditor of his intestate, cannot testify in regard to payments made him by the intestate upon the claim. The Statute of Limitations is not a defense to a claim for a balance of rent due under an agreement, covering over sixteen years occupation of premises at a fixed monthly rent, any balance due to be payable out of the tenant's estate at her death (occurring in 1900), as the balance does not become due until her death. Matter of Neil, 254.

See **Executors and Administrators; Judgment; Services; Surrogate's Court.**

DEEDS.

1. *Abatement of an alleged nuisance in a street refused to an individual where the street was not necessary for access to his lands and would, if abatement were adjudged, be only a cul de sac — Construction — Acceptance and delivery — Priority — Dedication and abandonment of way — "At any time" construed.*— In September, 1871, a woman, the owner of a tract of city land, contracted to convey the northern part of it by a full covenant warranty deed and her vendee, a university, covenanted and "irrevocably consented" that the city might "at any time" continue a street known as Chestnut, running northerly and southerly, from its then present southern terminus upon and across the lands to be granted and the lands retained by the woman southerly towards a cemetery, which was the southern boundary of all her lands. The terminus of the street at that time was not upon her lands but was north of them, and between her lands retained and the terminus there was a section of the proposed continuation having as owners or abutting owners the city and the university, whom she had no right to compel to open that section. In May, 1871, she conveyed to the university the premises agreed to be conveyed, including the site of the proposed continuation. "Subject, however, to Chestnut street through said premises as a public highway heretofore laid out and conveyed or dedicated as such highway" by her. On October 30, 1870, she had signed a deed to the city of a strip, across the lands conveyed and those retained by her, "as and for a public street or highway and not otherwise," and only for so long as it remained such. In November, 1870, the common council declared this a public street forever, as shown upon a map. The city never formally accepted this deed but it was acknowledged the day after its date, and the county clerk's certificate to the official character of the notary is dated September 30, 1871, and was recorded October 2, 1871. It appeared that in fact neither the city nor any one else had ever laid out, opened or worked this strip. Chestnut street, if continued, would have given additional access to the lands retained by the woman, and persons claiming under her brought this action to compel the university to remove a structure, in process of construction, which encroached on the continuation of Chestnut street as proposed. Held, that as the deed to the city was beneficial to it and it had in 1872 granted to a street railroad certain rights of way over the street or strip as defined in the conveyance, acceptance by and delivery to the city would be presumed as of the day the deed was recorded, October 2, 1871. That, as the deed to the university was first recorded, the university took title to the fee of the street or strip as against the city.

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DEEDS — Continued.
That, in view of the contract of sale with defendant and of the deeds, the city acquired the right to occupy the strip as a street, but not the fee to the land. That the city had lost this right by its failure to open and work the street or strip within six years from October 2, 1871 (L. 1861, ch. 311, § 1), and that the facts that the lands laid in a city and that the commissioner of highways had never filed a description of the abandoned highway could not alter this ruling. That the contract and deed of the woman with the university secured to her no servitude to have the street continued for the benefit of the lands which she retained, that the limit of the obligation of the university was to allow the city to construct the continuation, and that when the city lost its right to do so she had no right against the university. That the provision of the contract, that the city might "at any time" continue the street, was merged and satisfied by her deeds to the university and to the city, and that, if this were not so, the phrase "at any time" must be construed to mean that the city must act within a reasonable time. That the parties claiming under the woman were not entitled to relief against the university, as there was a necessary intervening section of the street which they were not entitled to have opened and, therefore, the section that might be opened would as to them amount only to a *cul de sac*. Raynor v. Syracuse University, 83.

2. *Created by several writings — Statute of Frauds — Statute of Limitations — Invalid State tax sale cured by statute — Invalidity of patent, how attacked — Bona fide purchaser — Notice.* — In an action by Richard Morgan to establish title to a lot in a tract of wild lands in Clinton county, it appeared that, in 1853, the lot was sold for taxes of 1847 and 1848, and was conveyed to the People by the State comptroller by a deed never recorded; that, in 1882, the State deeded the lot to Wales Parsons by a deed or patent recorded in Clinton county in 1882, Richard Morgan paying the whole consideration therefor; that, shortly before this deed passed, Parsons had given Morgan a mortgage to secure, as alleged, Parsons' debt for one-half of the consideration; that, on Parsons' Patent, there was a memorandum, signed with his initials, reading "Undivided one-half deeded Richard Morgan;" that, in 1892, Parsons, who died in 1895, wrote Morgan a letter in which he said he thought "we" could sell the lot for $4.000, and that, if Morgan would sell at that figure, "we" would give an option at that figure, and he requested Morgan to reply at once. The lands were sold, before 1895, on executions against Parsons; the defendants redeemed from the sale and also claimed under a deed from the owner before the tax sale. Held, that the written evidence taken as a whole created an express trust in Parsons, for the benefit of Morgan, which satisfied the requirements of the Statute of Frauds (2 R. S., m. p. 134, §§ 6 and 7). That the Statute of Limitations was not a defense to the action, as Parsons had not repudiated the trust, and had admitted it by his letter of 1892, within ten years of the bringing of the action. The owner, in 1847 and 1848, of the lands, which were in the town of Saranac, was then a resident of that town, but the lands were improperly assessed as non-resident, the assessors having jurisdiction of them. Held, that the sale of 1853 was valid, as the patent to Parsons was recorded in Clinton county in 1882, and section 132 of the Tax Law of 1896 had declared that every conveyance of a grantee of the comptroller, whose deed had for two years been recorded in the office of the county where the lands conveyed were located, should be conclusive evidence that the sale and all proceedings prior thereto were legal. The lands were within twenty miles of Clinton prison, and a sale of lands within that radius is forbidden by statute. Held, that, as the patent to Parsons was valid on its face, the defendants could not establish its invalidity by evidence outside of it, and only in a direct action instituted for that purpose. The answers of the defendants did not allege that they had no notice of Morgan's rights in Parsons' property, and it appeared that, when they bought of the purchaser at the execution sale, they had knowledge that Morgan had some claim. Held, that they were not *bona fide* purchasers, and that they only acquired the half interest of Parsons. Morgan v. Turner, 399.

See Easement; Ejectment; Highways; Title.

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DEMURRER.
See **Pleading.**

DEPOSITIONS.
Examination before trial — Direction to produce books improper — Code C. P., § 870 et seq.—An order, requiring the defendants, stock brokers, to submit to an examination by the plaintiff, their customer, in order that he may prepare his complaint, cannot properly require the defendants to produce all their ledgers and books which bear upon the transactions had between the parties. If, for the purpose of testifying, resort to the books is necessary, the defendants will be required to refer to the books for the purpose of giving the desired information. Clark v. Ennis, 339.

DEVISE.
See **Will.**

DISCONTINUANCE.
Attorney's lien — Not enforcible against responsible client's discontinuance of the action.— The lien of an attorney is enforcible for his protection only, and where his client, a plaintiff, is responsible and of his own motion consents to discontinue his action before trial and without costs, the attorney must look to him for compensation and cannot procure the order of discontinuance, even though irregular because not consented to by himself, to be set aside merely because it made no provision for costs. McKay v. Morris, 571.

DISMISSAL OF COMPLAINT.
See **Pleading.**

DISORDERLY PERSONS.
Evidence in one criminal proceeding cannot support the judgment in another — Code Crim. Pro., §§ 900, 901.—Where a wife charges and proves her husband to be a disorderly person in having failed to support her, evidence that he had not supported their child is incompetent in that proceeding, and therefore the magistrate's conviction of the husband on both charges is erroneous, and without evidence, in so far as it convicts him of the distinct offense of having failed to support the child. The fact that on the adjourned day, when the magistrate made decision, a complaint was made by the wife against the husband for his having failed to support the child, cannot support the conviction for that offense, as every criminal proceeding must be complete in itself, and the evidence in one such proceeding cannot be used to support, or be "competent testimony" (Code Crim. Pro., § 901) to support, the judgment in another. People ex rel. Keller v. Powers, 775.

DISTRICT ATTORNEY.
Compensation of his counsel in New York city — Certificate of presiding justice — Appeal — L. 1872, ch. 733, § 2; 1874, ch. 323, § 2; 1892, ch. 686, § 1.— The general statutory provisions authorizing a district attorney to employ counsel in an important criminal case were not repealed by the County Law, so far at least as relates to the county of New York, as the County Law does not apply to that county. The certificate of the justice presiding at the trial as to the amount of the counsel's compensation cannot be attached collaterally — on his subsequent application by mandamus to compel the city comptroller to pay him. If the district attorney or the comptroller regard his compensation as excessive, the district attorney should appeal from the order fixing it. People ex rel. McIntyre v. Coler, 454.

DIVORCE.
1. *Rights of corespondent under Code C. P., § 1757.*— The Legislature intended by Code C. P., § 1757, subd. 2, to give a corespondent, in an action for an absolute divorce, all the rights of a party. Where a husband sues for an absolute divorce and his wife denies adultery and sets up a counterclaim of his adultery with an unmarried woman and he does not reply thereto, the corespondent is entitled to intervene, answer, and demand and have a jury trial of the issues so far as they affect her. Rixa v. Rixa, 227.

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DIVORCE — Continued.

2. *Action for a separation — Alimony and counsel fee.*— Where a wife brings an action for a separation and for support and her affidavits indicate that her husband's course of conduct towards her has justified her in leaving him and entitles her to live apart from him, the rule that she should apply to the police courts for support will not be applied, as she in such case is entitled to alimony, as distinguished from mere support, and to a counsel fee to prosecute her action, relief which the police courts cannot give. Miers v. Miers, 476.

See **Contempt; Judgment.**

DOWER.

Testamentary provision not a bar — Consent to take gross sum — Code C. P., § 2793, subd. 3 — Compensation of attorneys for remaindermen.—A testator's direction to his executors to set apart from and apply out of the income of his estate a fixed annual sum for the support of his wife for life does not, on the face of the will, bar dower. Where the said fixed sum proved to exceed the entire income of the personal estate and of the real estate after its conversion into money in order to pay the testator's debts, and the widow was an incompetent person, the court refused the application of her committee to be permitted to take a gross sum in lieu of dower as not being proper nor in the best interest of the widow, and it directed that the balance, after payment of the moving creditor, be paid to the executrix of the testator in order to produce the widow's provision. Where the will directed that, after the death of the widow, the estate should be divided among collaterals, the court held that the claims of their attorneys against them for services could not be considered, while the widow was living, in the proceeding to sell the testator's real estate. Matter of Grotrian, 257.

See **Will.**

EASEMENT.

1. *Damages for Park avenue viaduct, Manhattan — User — Disturbance — Practical location.*— An abutter, since 1884, on Park avenue, Manhattan, where the Harlem railroad, in 1872–1875, widened its solid viaduct from twenty-four to fifty-nine feet, and, in 1894–1897, by the agency of an independent board raised it six feet and made it an elevated structure, using for its traffic during the latter period a temporary structure erected by that board, can recover of the railroad easement damages only for the increased height of the viaduct and only from the beginning of the use of the temporary structure, where neither she, nor any prior owner of the premises, had, before 1897, ever definitely interfered with the user of the railroad, and this although the first owner in her chain of title had conveyed to the railroad, for railroad purposes, only a twenty-four foot strip in the avenue, it appearing that he had previously conveyed the whole avenue, in front of the premises, to the city. A suit, begun by her in 1891 against the railroad and discontinued, cannot be deemed a disturbance of the user sufficient to break it. The practical location established by such acquiescence concludes the abutting owner as to damages before the construction of the temporary viaduct, even though the growth of business may have greatly increased the traffic over the viaduct as enlarged and elevated. Campbell v. New York & Harlem R. R. Co., 497.

2. *Right of pasturage — When it is a mere privilege.*— A clause contained in a deed giving the grantee a right to pasture certain lands of the grantor lying between the premises granted and the Hudson river, accompanied by a proviso that if, at any time, the grantee required a fence on those lands the right of pasturage should cease, is a license personal to the grantee and does not run with the lands. Whenever an easement or an appurtenance is not an essential and necessary adjunct to the lands conveyed its scope will be limited. Foster v. Village of South Glens Falls, 620.

3. *Way of necessity, not located — Reservation — When the court may locate — Route — Right to lay a pipe beneath its surface — Injunction.*— In

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EASEMENT — Continued.
1889 one Wiswall conveyed to E. and H. Hathorn, grantors in June, 1896, of the plaintiff, three acres surrounded by Wiswall and other lands and from a spring on the three acres the plaintiff subsequently obtained gas which it collected at the mouth of the spring, compressed into a liquid at its works at a distance, and sold to the trade. In April, 1896, Wiswall, reciting that it had been his intention to do so in 1889, conveyed to the Hathorns a right of way from the three acres "over the space between said lands, the bridge and broken road to and over said road" to a certain avenue. The bridge and "broken road" were on his lands and the avenue ran past the plaintiff's compressing works, situated on Hurlburt lands, and formed a boundary of the works. The "broken road" had already been used by divers grantees of the Wiswall tract to pass from their lots to said avenue. In 1893 Wiswall had conveyed to the defendant's grantors adjacent lands and expressly declared them subject to a right of way to the Hathorns, their heirs and assigns, "over the broken road as it now exists" to and from the lands he conveyed them in 1889, the deed of which had been recorded in 1889. The plaintiff now brings this action to have a right of way established as it had adopted one — over the "space", now of the defendant, and over the "broken road" to the avenue — and to restrain the defendant, a competitor in business, from tearing up a pipe the plaintiff had laid, or was trying to lay, over this route so as to carry gas from its spring to its compressing works. Held, that, upon a construction of the deeds and from the necessity of the case, the plaintiff was entitled to a right of way over the "space" to the "broken road" as well as over that road; and that the fact, that the lands now of the plaintiff were at the time of Wiswall's grant surrounded in part by his lands and in part by those of a third person, did not diminish the plaintiff's right to a way. That, where the grantor had not located the way, the grantee had a right to do so, but that as the parties had not located it effectively the court could and would do so. That the plaintiff must proceed in a reasonably direct way across the "space" to the "broken road" and along the latter to a point near the compressing works without again entering, from that road, upon the defendant's lands and must go around an addition, to a grist mill, constructed before the plaintiff claimed its present location. That the plaintiff also had a right to lay a two-inch pipe, for conducting gas, over the whole route, on the surface, or might sink it below the frost line, and that interference with the pipe, when laid, should be and was enjoined. New York Carbonic Acid Gas Co. v. Geyser Natural Carbonic Acid Gas Co., 668.

See City of New York; Ejectment; Railroads.

EJECTMENT.
1. *Words reserving an alley — Remedy in equity.*— Where deeds of partition made by tenants in common reserve an alleyway by metes and bounds and reserve to the grantee and his heirs the sole and exclusive enjoyment thereof, a subsequent grantee thereof may maintain an action against owners of the adjoining lot, out of which the alleyway was reserved and taken, to recover possession of it. The objection that only an easement was granted by the words of the deeds and that the remedy, therefore, is in equity comes too late when made at the close of the trial of the action in ejectment. Remson v. Hyams, 345.

2. *Foreclosure — Referee may convey within twenty years — Failure to file report of sale — Deed to a deceased purchaser — Assignee in possession.*— A referee in foreclosure may, as against the mortgagor's widow claiming dower, execute a deed within twenty years of the judgment, as not until then does a presumption arise that the mortgage debt has been paid or the judgment satisfied. A referee's deed, otherwise valid, conveys title, although no report of sale was ever filed and there is no proof, beyond the recital in the deed, that notice of sale was duly published. A referee's deed to the purchaser at the sale, deceased at the time of its execution, running to her, "her heirs and assigns forever", is valid where the deed recites the sale and the

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EJECTMENT — Continued.
payment of the bid and the heirs indicate acceptance of the deed by subsequently conveying the premises covered by it. The proper practice is, however, to have the deed run to the personal representatives of the purchaser. Where, in addition to the foregoing facts, it appeared that the grantee of the heirs entered immediately into possession and, by herself or her mesne grantees, remained therein undisturbed by any claim by or under the mortgagor for seventeen years, the court considered that the present holders of the title had become assignees of the mortgage, in possession, and that ejectment would not lie against them. Catlin v. Rea, 535.

ELECTION.
Principal and agent — Where both are liable.— Where both the principal and the agent are liable to the creditor they should not be sued jointly; the creditor should elect which one he will hold and a judgment against either, though unsatisfied, will discharge the remedy against the other. Lage v. Weinstein, 298.

See Actions.

ELECTIONS.
At a town meeting held by districts — Town Law governs — Irregularities not fatal.— An election at a town meeting, in a town where such meetings are held by districts, on a day other than a general election day is not governed generally by the Election Law (L. 1896, ch. 909), but mainly by the Town Law. The town canvassing board cannot be directed to convene, recanvass the votes cast at such an election (on the local option questions), and, in so doing, reject, for irregularities, returns from certain districts, unless the returns attacked are wholly void. Where the people of a town have expressed their will at an election, it should not be overridden because of the negligence and carelessness of the town officers. The following deviations from the Town Law (L. 1890, ch. 569, § 38, renumbered, and amended by L. 1899, ch. 168, § 2), were regarded by the court as not fatal: That, in two districts, the inspectors selected one of their number as poll clerk; that, in some districts, the poll lists were not subscribed as required by the statute; that, in one district, the inspectors did not return how many ballots were void, it appearing that the void ballots were inclosed by them in a sealed package and filed with the statement of the canvass; that, a supervisor of the town, who took no part in the canvass, was present at it and signed the statement of it. People ex rel. Guernsey v. Pierson, 406.

See Liquor Tax Law.

ELECTRIC LIGHT COMPANIES.
Mortgage of after acquired property — Priority of lien — Terms of mortgage — Extension of line.— An electric light and power company, incorporated under the Transportation Corporations Law (L. 1890, ch. 566, § 60), has power to execute a trust mortgage, securing its long term bonds, which will cover after acquired property. The necessity for its having such power stated. Where a creditor of such corporation, whose judgment was recovered after the corporation had executed such a mortgage, levied upon wire which it had bought, after such execution, to extend its line but had not yet strung upon its poles, the court held the lien, on the wire, of the mortgage superior to that of the execution, but directed that, on a sale to be had on the foreclosure of the mortgage, the mortgaged property be sold in parcels and the wire last. Statement of the terms of a mortgage deemed sufficient to cover after acquired property. Articles of association broad enough to authorize the company to extend its line into an adjoining town of the county. Metropolitan Trust Co. v. Dolgeville Electric Light & Power Co., 467.

ELEVATED RAILROADS.
See Railroads.

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EMINENT DOMAIN.

Taking property by eminent domain before paying for it — Injunction pendente lite — L. 1897, *ch.* 378, § 1439. — A statute authorizing a city to take private property under the right of eminent domain, and not providing for payment therefor before or concurrently with the taking, is constitutional where it does provide a sure, sufficient and convenient legal remedy by which the property owner can coerce payment. Where the continuance of a preliminary injunction would practically terminate the litigation, and in favor of the plaintiff, the motion for a continuance should be granted with great caution and must be denied where the right to ultimate relief is in serious doubt. Connolly v. Van Wyck, 746.

EQUITY.

Decision — Opinion — Rescission — Statement of an opinion not fraud.— There is no statute or practice which requires insertion, in a decision in equity in favor of the plaintiff, of the reasons why defenses set up in the answer are not sustained, nor need the justice write an opinion in the case. A party cannot rescind a contract unless he restores what he received under it. A party's statement of his legal rights in a play, if incorrect, cannot constitute actionable fraud. Brady v. Edwards, 435.

See **Judgment; Promise.**

ESTOPPEL.

Amendment reducing the withdrawal value of shares in a mutual association.— A shareholder in a mutual savings and loan association who, knowing of an amendment to its articles which may have reduced the withdrawal value of his shares below their actual value, stands by for two years and without protest sees other members pay their dues on the new basis, cannot, nor can his assignee, afterwards claim against the association, upon withdrawal therefrom, any greater sum than the amendment entitled him to. Gardner v. New York Mutual Savings & Loan Assn., 115.

EVIDENCE.

1. *Harmless error — Competency of experts.*— Error, in admitting harmless parol evidence in regard to a written contract, is not a ground for reversal. The testimony of other persons, in regard to the competency of an expert, is admissible, and the court is not confined in determining competency to the expert's own testimony. Wright v. Schnaier, 37.

2. *Funeral expenses — Primarily a charge against the decedent's estate — Evidence of estate.*— Funeral expenses are primarily a charge against the estate of the deceased and where he leaves one, resort should first be had to it. Where, therefore, an undertaker sues a defendant upon his alleged contract liability for the charges of the funeral of one to whom he had borne the relation of an adopted son, the defendant is entitled to show that the deceased left an estate and it is fatal error to exclude the evidence. Huhna v. Theller, 296.

3. *Code C. P.*, § 829 — *Defense of payment to donee causa mortis of depositor.*— Where an administrator of a depositor sues a savings bank for the depositor's balance of account, and the bank answers that it has paid it to a third party as donee *causa mortis* of the depositor, the bank has a right to the testimony of the donee regarding the gift and its exclusion, under Code C. P., § 829, is erroneous. Podmore v. Seamen's Bank, 379.

4. *Crimes — Certificate of reasonable doubt — Admission of improper.*— Where a witness for the prosecution is permitted to give evidence on the trial of an indictment of conversations, had by him with the defendant five months after the commission of the crime named in the indictment, in which the witness charged the defendant with the commission of similar crimes with other persons as well as with other and different offenses — to which charges, it seems, the defendant made no reply — the admission of such in-

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EVIDENCE — Continued.
competent evidence creates such a reasonable doubt as to the legality of the defendant's conviction as justifies the issue of a certificate of reasonable doubt whether the judgment should stand. People v. Bushnell, 452.

5. *Parol, when inadmissible to vary a written contract.*— Where an executory contract for the sale and delivery of printed matter to advertise a business is complete in itself and on its face, and it is shown that the whole contract has been reduced to writing, it is erroneous for the trial court to admit, in an action for the price, evidence upon the part of the vendee importing into the contract an additional collateral parol condition. Doolittle v. Fitchett, 529,

See **Bonds; Criminal Law; Decedents' Estates; Deeds; Disorderly Persons; Gift; Mortgage; Negligence; Replevin; Sales; Services; Surrogate's Court.**

EXCISE.
See **Liquor Tax Law.**

EXECUTION.
Leave to issue, after five years — Judgment not assailable — Moving parties — Code C. P., §§ 1376, 1377.— Upon an application for leave to issue execution after the lapse of five years from the entry of final judgment in an action, the court will not inquire into the validity of the judgment nor permit the judgment-debtor to show that no summons was ever served upon him in the action. Where a firm composed of two partners recovered the judgment on a firm debt, and one partner thereafter died, the court held that the executrix of the deceased partner might properly join with the survivor in the application for leave. Matter of Armstrong, 327.

See **Creditor's Action.**

EXECUTORS AND ADMINISTRATORS.
1. *When not chargeable with his attorney's concealed debt to the testatrix.* — An executor is not chargeable upon a judicial settlement of his accounts with the amount of his attorney's note to the testatrix (lost to the estate) where the executor had no actual notice of the existence of the indebtedness, nor any constructive notice except upon the legal theory that the attorney's knowledge was his, and particularly where the attorney was shown to have been guilty of numerous other improprieties in the case. Matter of Guldenkirch, 123.

2. *Rent accruing before the death of the intestate goes to the administrator — Payments on realty improperly paid out of personalty.*— Rent which accrued to an intestate before his death passes to his administrator and the latter may sell the claim for it. Taxes and assessments on, interest on mortgages against, insurance premiums upon, and repairs to, real estate of an intestate cannot lawfully be paid by the administrator out of the personalty as against the next of kin, even though he and they are tenants in common of the said real estate. Matter of Foulds, 171.

3. *Commissions refused as trustee.*— Where the provisions of a will manifestly contemplate the continued co-existence and exercise of the duties of executor and those of trustee until the distribution of the fund, commissions will be awarded only in a single capacity, and where they have been awarded, upon his accounting, to one as executor only, an unauthorized direction of the decree that the balance be paid over to a trust company as "executor and trustee" cannot enlarge the company's rights to commissions nor entitle it, upon the settlement of its accounts, to commissions in both capacities.— Matter of Union Trust Co., 260.

4. *Power of surrogate on reference by consent of a disputed claim — Code C. P.*, §§ 1822, 2743.— Where parties consent in writing that the surrogate may hear a disputed claim upon the judicial settlement of the accounts of the executor or administrator, the surrogate has power to inquire into and pass

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EXECUTORS AND ADMINISTRATORS — Continued.
upon the payments made and may determine the amount due and the person entitled to it. Matter of Browne, 366.

5. *Foreclosure — Appointment of temporary administrator — Collateral attack — Presumption of death — Tender.*— A temporary administrator, whose function is only to collect and preserve the estate, may be appointed upon much weaker proof, raising a presumption of the death of the intestate, than a permanent administrator. If there was slight proof of such a character before the surrogate at the time when he appointed a temporary administrator, the appointment cannot be questioned collaterally. There is no arbitrary rule as to the length of the continued absence which will raise a presumption of the absentee's death. Czech v. Bean, 729.

See **Assignment; Attorneys; Gift; Savings Banks.**

FEES.
See **Referee.**

FORECLOSURE.
1. *Rent, as between a receiver of the rents and profits and a tenant who had paid in advance.*— Where a tenant of the whole of mortgaged premises has paid the rent therefor in advance to the mortgagor, a receiver of the rents and profits, appointed under a clause in the mortgage authorizing such appointment on foreclosure, cannot prevent the tenant from collecting the rents of the subtenants during the period of the tenant's advance payment, and this although the mortgage was recorded before the lease. The tenant's rights are not cut off until the sale in foreclosure and the receiver has no right to rents paid the mortgagor before the receiver's appointment. Fletcher v. McKeon, 230.

2. *Rent as between a mortgagee to whom rents had been assigned on default in interest and a lessee who had paid rent in advance, with notice of the mortgage.*— Where default is made in the payment of the interest on a recorded mortgage, in process of foreclosure, providing that upon default in interest the rents are assigned to the mortgagee, a lessee of the premises, who became such after the default and who paid his rent in advance, cannot enjoin a receiver of the premises from collecting rent accruing during the period for which the lessee has paid, as the lessee is charged with notice of the rights of the mortgagee. Moll v. McKeon, 551.

3. *Default caused by alleged tort of those controlling the (railroad) property — Protesting bondholders, not parties, permitted proof before a referee to compute.*— Allegations upon the part of holders of railroad bonds, secured by a trust mortgage in process of foreclosure, to the effect that foreclosure was made necessary because persons, controlling the road and substantially all the other bonds, failed to pay the interest and that they had so failed because they had improperly diverted the funds of the road, are insufficient to prevent a reference to compute the amount due, on default made, but the court permitted such holders, although not parties, to appear on such reference and give evidence in support of their contentions and also directed the referee to report whether, in his opinion, a wrongful diversion of the funds of the road had caused the foreclosure. Central Trust Co. v. Unadilla Valley R. Co., 604.

4. *Election, to accept option to foreclose for unpaid installment, shown by action brought.*— Where the mortgagee is given by a mortgage an option to foreclose it upon a failure of the mortgagor for sixty days to pay an installment of principal or interest, the mortgagee's commencement of an action of foreclosure sufficiently indicates his election in the matter, and his right so to foreclose is not affected by another clause of the mortgage, relating to taxes and assessments only, under which sixty days "after demand and notice" in regard to them must elapse before the whole amount shall become due. Boigeol v. Eigabroadt, 606.

See **Corporations; Ejectment; Executors and Administrators; Mortgage.**

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FORGERY.
See Indictment.

FRAUD.
Rescission — Presumption of knowledge of contents of instrument signed — Opinion as to legal effect — Expression of judgment as to the situation.— Where an agreement between the owner of certain stock and a promoter of its sale in a foreign market provides that the owner shall ultimately receive thereunder both stock and cash, the owner cannot rescind a second agreement, by which he for value surrendered to the promoter his rights under the first, upon allegations that the promoter falsely represented to him that under the first the owner was only to receive either stock or cash — where the owner also alleges that he never saw the first agreement, that it was executed by his attorney in fact, that he had no knowledge of its contents except as it had been communicated to him, and that he believed the agreement to be as written and as it appeared on its face. Parties are presumed to know the contents of an agreement they sign; and if either mistakes its legal effect it is not actionable fraud available to the other. In such a situation as that above stated a party has no right to rely upon the statements of his adversary. It is to be presumed that the attorney of the owner correctly stated to him the contents of the agreement. An alleged statement of the promoter, that it would be impossible for him to advance the sale of the stock unless the owner took it out of a pool into which it had been put and assigned it to him, is only the promoter's statement of his judgment as to the situation and cannot constitute actionable fraud where he did not suppress any material conditions which the owner had a right to know. Leszynsky v. Ross, 652.

See Damages.

FRAUDULENT CONVEYANCE.
Creditor's action — Fraudulent transfer between brothers.— In a creditor's action, it appeared that the defendant, George W. Bronson was a brother of the defendant, James H. Bronson, and his employee from 1873 to 1885 at $1,100 per year, and that he had been paid therefor. In 1896, after James H. had become largely indebted to the creditor, James H. gave George W. a note for $8,624, representing, as alleged, the latter's agreed unpaid extra compensation at $400 per year, for eleven years, and interest, then first given, and added to the note. James H. had at all times been able to pay the principal of this debt, if he owed it. In 1897, after procuring the creditor to give him an extension of time, James H., for the note and debt, conveyed to George W. his homestead worth $10,000, and this, with other transfers, left him without property. He remained in the homestead. Held, that there was no valid consideration for the transfer of the homestead and that the transfer must be set aside as intended to hinder, delay and defraud the creditor. Fox v. Bronson, 431.

GIFT.
Inter vivos — Avoided by donor's retention of control — Code C. P., § 829.— A testator deposited, nine months before his death, money in a bank in his own name, "In the event of death payable to Peter Rose," his executor and brother and who was with him, and at the same time filed an order with the bank directing payment to Peter in case of his own death. He also had said to the bank officials "I want my brother Peter to have this money." Fifteen minutes after the deposit but before the parties had left the bank, the testator gave Peter the bank book and said, "There is the book and there is your money." Held, that the gift must be treated as one *inter vivos*, that the testator evidently intended to retain control of the deposit during his life, that the gift was conditional and therefore void as a gift, and was not enforcible as a trust, for Peter, either in the bank or in the testator. Where a special guardian for infant legatees seeking to surcharge the accounts of the executor by the amount of the bank deposit, cross-examines the executor as to the transaction of gift, the executor is entitled to prove the whole transaction and conversation had by him with the testator, although part of it occurred fifteen minutes after the deposit but before the parties had left the bank. Matter of Rose, 21.

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GRAND JURY.

Crimes — Resubmission to grand jury of a charge dismissed — Code Crim. Pro., § 270.— The power of the court to direct a dismissed criminal charge to be resubmitted to the grand jury should be sparingly exercised and will not be exercised where the affidavit of the district attorney merely states, without giving any facts, that he is of opinion that the grand jury misunderstood the law and that if the charge is resubmitted an indictment "may be found." People v. Neidhart, 191.

See **Indictment.**

HIGHWAYS.

Deed — Words passing the fee in a highway.— The law presumes that a grantor who conveys lands upon a public highway does not intend to reserve the fee of its bed and this presumption can only be rebutted by clear and decisive language. A conveyance of a farm in the city of New York, divided by the Greenwyck road running northerly and southerly, which, after conveying separately the part west of the road and the bed of the westerly half of the road, conveys the part east of the road by a description, in courses and distances, "beginning on the east side of Greenwyck road at the northwest corner of the land of Lewis Scott (adjoining on the south) * * * and is known in a division of the estate of Jacobus Van Orden, deceased, by lot number 2, and is bounded * * * to the westward by Greenwyck road" sufficiently conveys to the grantee the fee of the bed of the easterly half of the road. Pell v. Pell, 472.

HUSBAND AND WIFE.

Equitable action by her to enforce, against his legatees and devisees, his promise to provide for her by will if she would abandon separation proceedings — Statute of Frauds.— A parol agreement, made since the passage of the Domestic Relations Law (L. 1896, ch. 272, art. 3, § 21), by the terms of which a husband promises his wife that if she will abandon her proceedings to procure a separation from him, to which she deems herself entitled, and will return to and live with him, he will provide for her by will, when followed by her permanent return to him and his execution of such will, constitutes a valid executed contract which she may enforce in equity against his legatees and devisees under a subsequent will made by him in contravention of the parol agreement. The Statute of Frauds is not a defense to the action as the wife has made full performance. Goldstein v. Goldstein, 251.

See **Disorderly Persons.**

INDICTMENT.

1. *Crimes — Description of a forged check according to its tenor — Rejection of surplus allegations as to its substance.*— An indictment for forgery in the second degree, otherwise sufficient, which, in describing the instrument forged and uttered, alleges "which said forged instrument and writing in substance is as follows, that is to say:

'New York, ..., 1900.

The Chemical National Bank Pay to Samuel W. Levey, or order, forty-one 78/100.

$41.78/100. Stiefel, Sachs & Company.'

a more particular description whereof is to the Grand Jury aforesaid unknown" is sufficient as containing a plain and concise statement of the act constituting the crime and the instrument is to be deemed to have been pleaded according to its tenor. The words "in substance" and "a more particular description whereof is to the Grand Jury aforesaid unknown" are to be rejected as surplusage, and hence the rule that, where the substance may be pleaded because of a disabling cause that cause must be pleaded as an excuse for not pleading the tenor, has no application. People v. Hertz, 177.

2. *Crimes — In larceny by false pretense, the pretense must relate to some past or existing fact — Demurrer — Penal Code*, § 528.— An indictment for

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INDICTMENT — Continued.
larceny by false pretenses, alleged to have induced the complainant to part with his saloon, stock and fixtures to the defendant for $200 and his worthless note, which states the false pretenses as consisting in the defendant's falsely pretending that he was "desirous" of owning saloons, that he was "desirous" of purchasing the saloon in question, that he owned two houses and lots, that he did not have the money to pay for the saloon and was "desirous" of paying for it partly in cash and partly by his note, that a certain memorandum in writing exhibited and presented by him was a valid lien on the houses and lots and prevented their sale until the note was paid, is demurrable as containing no false pretenses relating to a past or existing fact, except that relating to the ownership of the two houses and lots; and where the indictment shows that such ownership was not the cause which induced the complainant to part with his saloon, the demurrer must be sustained. People v. Hart, 182.

3. *Crimes — Removal of indictment to Supreme Court from General Sessions of New York — Code Crim. Pro.*, §§ 344, 966.— Indictments may as matter of right be removed into the Supreme Court from the Court of General Sessions of the Peace in and for the city and county of New York, for good cause shown. Where the indictments charged the fire commissioner of said city individually with felonies and misdemeanors affecting his official conduct and also with conspiracy, with another defendant, to defraud the city in the matter of bids for fire department work, and the commissioner alleged that he had acted in all the transactions on the legal advice of the corporation counsel, and it was apparent that important questions of law would be involved in the defense, the Supreme Court removed the indictments to itself, stating at the same time that such removal did not and could not cast any reflection upon the Court of General Sessions. People v. Scannell, 558.

4. *Of police officer for an omission of duty, in having failed to suppress houses of ill fame — Offense at common law — Sufficiency of indictment — Effect of Penal Code, § 154 — Charging a single crime — Statement of the criminal act.*— Every willful disobedience of a law enjoining the performance of official duties and every willful neglect of such duties is a crime at common law and neither corruption nor injurious result need be proved as an essential thereof. An indictment, which charges a police captain of the city of New York with willfully omitting to perform the duty enjoined upon him by law, of observing and inspecting houses of ill fame and repressing all unlawful or disorderly practices therein, in that for about fourteen months there were continuously and openly kept and maintained in his precinct 109 such houses, described by street and number, where unlawful and disorderly practices were committed and where common prostitutes and disorderly persons resorted and resided, and which also charges that he continuously and willfully neglected his duty to repress them or the practices of their inmates, states facts which constitute the statutory crime of an omission of official duty. The provision of the Penal Code, § 154, making every willful omission of duty by a public officer, "where no special provision has been made for the punishment of such delinquency", a misdemeanor, affords no ground for the defendant's contention that he is thereby made responsible only for a violation of the rules of the police department covering a neglect of duty and only to that department, as any neglect or omission of official duty is a crime against the People, punishable by them, and moreover the "special provision" means one of law and none applicable to a willful omission or neglect of duty exists except those contained in the Penal Code, §§ 117 and 154. The indictment, in so far as it charges the defendant with willfully omitting to suppress 109 houses of ill fame, does not charge 109 crimes but charges one neglect of duty predicated on many acts of omission. The allegations of the indictment, "that there were certain houses of ill fame in which unlawful and disorderly conduct and practices were committed, and divers common prostitutes and disorderly persons resorted to and resided therein and solicited men", while sufficient as alleging the existence of the houses, are insufficient as to the defendant since he is entitled to know what he has to meet on the trial, and therefore there should be

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INDICTMENT — Continued.
such particularity in regard to each house, by a distinct allegation of time, place and description, as would, under the general issue, warrant the introduction of testimony as to its character and the acts committed therein and enable the court to pass judgment, as matter of law, upon any one allegation as if it were the only one pleaded. *Semble*, that the names of the keepers of the houses should be set forth if known, and if unknown, that that fact should be stated. People v. Herlihy, 711.

See **Criminal Law; Liquor Tax Law.**

INFANTS.
See **Trusts.**

INJUNCTION.
1. *Purchaser of an apartment house enjoined from interfering with a tenant whose lease had not expired.*— A tenant in lawful possession of an apartment for a term unexpired, entitled at all reasonable hours to the rights of ingress and egress, to gas and water supply and to elevator service, may enjoin a purchaser of the apartment house who bought with notice of the tenant's rights and recognition of them, from interfering with any of them in the process of tearing down the building; and the fact that the purchaser intends to erect a new and expensive building and will lose largely if the tenant occupies until the end of his term, is not a sufficient reason for remitting the tenant to his action at law for damages. Proskey v. Cumberland Realty Co., 50.

2. *Justices of the Appellate Division cannot be restrained by a justice of the Supreme Court from the performance of a judicial act — Code C. P., § 605.*— A justice of the Supreme Court has no power temporarily to enjoin the justices of the Appellate Division of his department from proceeding under an act (L. 1901, chap. 602) directing them as such justices to appoint a commissioner of jurors for a county within the department, the ground of the injunction being the alleged unconstitutionality of the act. Such an injunction is improper for the further reason that the justices of the Appellate Division are State officials and an application to a justice of the Supreme Court for an injunction against them is forbidden by Code C. P., § 605, requiring the application to be made at a term of the department. Melody v. Goodrich, 138.

3. *Rights as between a landlord who desires to improve premises and a tenant of a part of them.*— A tenant of a café and barroom in Manhattan will not be granted a continuance of a temporary injunction restraining his landlord, about to add several stories to the building, from erecting a wooden bridge or structure in front of the tenant's demise interfering to some extent with his easements of light, air and access, where the bridge is required by and complies with the building code of the city of New York and is essential to the building operations, as in such case the continuance of the injunction would be a greater hardship to the landlord than its vacation would be to the tenant. Gerken v. Hall, 225.

4. *Against a city ordinance impairing property rights by reducing speed of trolley cars — Reasonable speed.*— The enforcement of a penal ordinance will not usually be restrained by injunction, but equity may restrain any act, whether or not connected with crime, which tends to impair or destroy property or property rights. A street railroad company is entitled to enjoin a city from enforcing a penal ordinance or resolution of its common council limiting the speed of street cars in the city streets to six miles an hour, it appearing that such a speed was a detriment to the company and to its service to the public. An ordinance of local authorities regulating the speed of street cars is required by section 98 of the Railroad Law to be reasonable and one limiting speed to only six miles an hour is unreasonable and void. *Semble*, that in a city where the streets are wide, level and comparatively straight, and where for several years no accident has occurred from trolley cars running through

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INJUNCTION — Continued.
at the rate of ewelve miles an hour, such a speed would be reasonable for such cars. United Traction Co. v. City of Watervliet, 392.

5. *Trades' union — Right to send out hostile circulars in a trade dispute — Injunction pendente lite.*— Merchants will not be permitted to restrain garment workers from sending circulars to customers of the merchants, alleged to have seriously affected their business and likely to cause them irreparable damage, where the circulars are not shown to contain any threats or intimidation. An injunction *pendente lite* will be refused where the relief afforded by it would be the same as if the plaintiffs succeeded at the trial, and their right to the relief sought is doubtful. Cohen v. United Garment Workers, 748.

See Easement; Eminent Domain; Landlord and Tenant; Nuisance; Trademarks.

INSURANCE (CREDIT).

"Gross sales" of insured how computed on insolvency of the insurer — Construction of a compromise clause — "Securities of such debtor" — Practice, where a rejected claim is approved and sent back by the Court of Appeals.— Where a corporation, insuring creditors against loss of the debts of their commercial debtors, becomes insolvent during the life of its policy providing that the loss of the insured is to be adjusted only so far as it exceeds a stated percentage of his gross sales — the minimum thereof being fixed at an arbitrary sum for the purposes of computation — this minimum must be adopted as the amount of the gross sales at the time the insurer became insolvent and, upon it as a basis, the insured may be allowed, in proceedings to dissolve the corporation, in such proportion as the term of the policy bears to the time which had elapsed after its issue and before the insurer became insolvent. The policy provided, in substance, that it should be enforcible by the insured where his debtor made a general assignment or went into the hands of a receiver or, without failing in business, offered to compromise under a compromise approved by the insurer. A debtor in the hands of a receiver offered a compromise to the insured by giving notes on time but the offer was never accepted or executed, although the insurer agreed that any ultimate loss on the notes should be readjusted until Nov. 9, 1899, the maturity of the last note, under a clause which provided that where a debtor's offer of settlement had been deducted on an adjustment and the insured did not subsequently realize the amount of the offer, the loss should be readjusted provided the estate of the debtor was settled and the deficiency ascertained within twelve months from the expiration of the policy. The policy expired March 31, 1897. The deficiency was not ascertainable until 1899. Held, that as the offer of compromise was never carried out nor made the basis of an adjustment there could be no readjustment under the clause providing therefor, and that the loss was to be computed under the clauses of the policy which governed cases of insolvency. Under a clause of the policy declaring that, in estimating the loss of the insured upon a debt due him from an insolvent, "the securities of such debtor held by any one at the time of the appointment of such receiver, taken at their actual value, and the other assets of such debtor taken at the value as shown by his books * * * less twenty-five per cent., shall be deemed a payment to the extent of such value on account of the amount owing to the insured", neither the lands of the debtor nor mortgages upon them are "securities of such debtor". Where claims of creditors rejected by a referee in dissolution proceedings are taken to the Court of Appeals, are there allowed as to amount and are then sent back to him for a further hearing, the proper practice of the creditors is to enter orders establishing their claims against the funds in the hands of the receiver of the corporation, and it would be improper for them to enter judgments upon the remittitur. People v. Mercantile Credit Guaranty Co., 755.

INSURANCE (FIRE).

Temporary agreement to reinsure risks — Failure of consideration as affecting the insured — Privity.— A temporary agreement, to be replaced

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INSURANCE (FIRE) — Continued.
by a final one "of like terms and conditions" when the balance of the consideration shall be determined and paid and to be void unless it is paid, by the terms of which the risks of one fire insurance company are assumed by another, makes the latter at most a reinsurer; and, therefore, where the consideration as determined is not paid in time by the company discontinuing business, and the temporary agreement is therefore declared abandoned by the reinsurer, and the final one is never executed, neither a policyholder of the discontinuing company, nor his assignee, can recover of the reinsurer a loss which occurred before the reinsurer abandoned, as there is no privity of contract between it and him under the temporary agreement and the consideration for the final agreement has failed. Hoffman v. North British & Mercantile Insurance Co., 40.

See **Corporations.**

INSURANCE (LIFE).
See **Benefit Societies.**

INTEREST.
Statute (L. 1900, ch. 678), showing an intention to give it.— A statute (L. 1900, ch. 678) for the payment of a contractor with Long Island City for work done for it in 1888 and 1889 empowered the board of estimate and apportionment of New York city to act in the matter, declared that if it appeared to the board that the services were actually contracted for and performed and that the fair and reasonable value of the work "was" the sum of $3,862.50, as claimed, or any less sum, the board should certify what the work "was" reasonably worth and the city comptroller was authorized to pay the claimant that sum, "together with interest on the aggregate sum so certified". In April, 1901, the board certified that the fair and reasonable value "is $3,862.50". The work was completed on or before December 22, 1889. Held, that it was the evident intention of the Legislature that the claimant should have interest from the completion of the work, December 22, 1889, and not, as claimed by the city, from April, 1901, when the board made its certificate. Coughlin v. City of New York, 446.

See **Tender.**

INTERPLEADER.
Order of.— A defendant cannot procure an order of interpleader, upon allegations that another person claims the same money as the plaintiff and for the same services, where the defendant does not admit liability to either party, nor shows that the claimant has any foundation for his claim, or makes it appear that it would be hazardous for the defendant to determine which party he should pay, and particularly where the claimant denies that he claims the fund and alleges that he has commenced an independent action against the defendant for services of the same nature. Cohen v. Cohen, 206.

JUDGMENT.
1. *Equity — Action to charge a judgment, against a corporation for a tort, upon a person as being in fact the corporation — Demurrer to complaint.*— Persons who have recovered in another court but have failed to collect a judgment against a corporation based upon its negligence in managing its towboat cannot in equity charge the judgment upon one whom they allege was "the company" at the time of the tort by virtue of his being the sole owner and who as they allege defended the action by an attorney of his own selection. *Semble*, that an action at law might be brought against the present defendant for the same negligence and that upon that question, as well as upon the question of damages, the judgment in the other court could be used as conclusive evidence against the defendant upon proof of his interest and participation in the other action. Tilley v. Coykendall, 164.

2. *Divorce — Motion to vacate judgment after death of plaintiff — Remedy.* — Where the plaintiff in an action for absolute divorce dies after judgment

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JUDGMENT — Continued.
has been rendered in his favor, the defendant cannot move, in the action, to vacate the judgment on the ground that it was improperly obtained. To that end she must bring a separate action against all the heirs and other persons interested in the plaintiff's real estate, grantees thereof subsequent to the judgment, and his personal representatives. Groh v. Groh, 354.

3. *Status of one recovered in the lifetime of an intestate — Principal and surety — Joint debtors — Code C. P.*, §§ 1822, 2718, 1942–1944.— A judgment docketed against an intestate in his lifetime cannot be rejected and referred under the statute as it is a debt which has been established by a court of competent jurisdiction. In such case the surrogate must determine to whom the judgment is payable, the sum to be paid, and, among other things whether it has been paid. The relation of principal and surety exists between an owner of real property, personally liable on a bond secured by mortgage upon the property, and his grantee who assumes payment of the mortgage, and consequently where the assignee of a deficiency judgment recovered upon the foreclosure of the mortgage is paid that judgment by such a grantee and satisfies it, the assignee cannot again recover its amount of the grantor, since deceased, and a judgment-debtor in the same judgment, provided the said assignee had notice of the existence of the relation of principal and surety. Such a satisfaction is not a compromise of a joint obligation within Code C. P., §§ 1942–1944, as the obligation is not joint. Matter of Browne, 362.

See **Appeal; Bankruptcy; Execution; Replevin; Res Adjudicata; Trusts.**

JUDICIAL SALES.

"Highest bidder" — Resale — Code C. P., § 1678.— Real property must be sold at a judicial sale to the highest bidder and this means the highest bidder at the sale who is then and there willing and financially able to carry out the terms of sale. An auctioneer has a right to ignore or reject the bid of an irresponsible person. Where parties to an action in which there has been a judicial sale attack the sale for irregularities, and because their bids were ignored, they must show that they themselves were technically right. To procure a resale they should show that they were able at the sale to make the cash payment on their bid, that they are pecuniarily responsible, that the property sold was worth more than the bid accepted, and there should be a *bona fide* offer of an increased price, with satisfactory security. Irving Savings Institution v. Robinson, 449.

JURISDICTION.

Existence and jurisdiction of foreign court how proved and when judicially noticed without proof — Waiver of lack of jurisdiction of the person — Code C. P., § 942.— The jurisdiction of the High Court of Justice of the Province of Ontario of the Dominion of Canada, a court of original jurisdiction, is sufficiently proved where a book, purporting to be the last revision of the statutes of the Legislature of the Province and containing the Judicature Act establishing the jurisdiction of its High Court, is given in evidence and identified by one, who had been a solicitor and practitioner in that Province, as issued officially by the Queen's printer. The Supreme Court of the State of New York may take judicial notice of the existence and jurisdiction of the said High Court. Where a resident of the State of New York, served within it with a writ of said High Court, appears in said court by solicitors who, in the same instrument, expressly object to the jurisdiction, and thereafter serves a general denial to a statement of claim served upon his demand therefor, and also interposes an affirmative defense raising the question of jurisdiction, he has, by his acts of voluntary appearance and by his answer, waived general jurisdiction of his person, and therefore cannot raise that contention in order to defeat an action subsequently brought in our courts upon a judgment rendered against him by a justice of the said High Court, after a trial had on the merits in the action brought in that court. Grant v. Birrell, 768.

See **Municipal Court of New York.**

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LABOR.
See **Negligence.**

LACHES.
See **Attachment.**

LANDLORD AND TENANT.
1. *A covenant to surrender is real — Against assigning a lease, when broken.* — A covenant to surrender premises for a consideration, if the landlord sells during the term, is a covenant real and is enforcible by an assignee thereof; and it is not a defense to his action for the consideration of surrender that the defendant landlord failed to consummate the sale. A covenant against assigning a lease is not broken by an assignment thereof unless the landlord re-enters. Dierig v. Callahan, 30.

2. *Condition as to landlord's furnishing power — Injunction.* — While a tenant is in lawful possession of premises under a lease by the terms of which the landlord is to furnish him power, the landlord will be enjoined from cutting off the power notwithstanding the fact that differences have arisen between the parties in regard to the payment of rent. Traitel Marble Co. v. Chase, 233.
See **Foreclosure; Injunction; Summary Proceedings.**

LARCENY.
See **Indictment.**

LEASE.
See **Landlord and Tenant.**

LEGACY.
See **Will.**

LIBEL.
1. *New trial after an appeal.* — Upon an appeal from a judgment for the plaintiff upon the first trial of an action for a libel alleged to have charged the plaintiff with having dishonorably kept his aged father's securities, and in which only general damages were claimed, the Appellate Division decided that as the trial justice had held the publication not libelous *per se* he should have directed a verdict for the defendant, that the innuendo charged in the complaint, not being one which could be drawn from the publication, was insufficient, and that the publication was not libelous *per se*. Upon a second trial the justice left it to the jury to say whether the publication imported the charge alleged, told them that if the charge alleged was made and was false the plaintiff had a right of action, permitted them to find, if an innuendo was necessary, that the one stated in the complaint, larceny, would cover a milder charge of the same nature, and instructed them that an innuendo was of little use provided the fair import of the words brought the minds of readers to the hurtful conclusion. The jury found for the defendant. Held, that a motion to set aside the verdict must be denied as the jury must have found the publication not libelous, or that the facts proved justified the charge made. Beecher v. Press Publishing Co., 418.

2. *Per se, in regard to the capacity of an advertising agent — Demurrer overruled.* — A complaint which alleges that the defendant published in regard to the plaintiff, an advertising manager, a statement that he, with others of its employees, had been dispensed with, that the reason for the change was their general careless manner of attending to the business, and that their places would be filled with competent parties who would attend to the affairs in a more business-like manner, is not demurrable as failing to state a cause of action, since the words, written of, and tending to injure the plaintiff in, his business, are libelous *per se*. Ratzel v. New York News Publishing Co., 487.

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LIEN.

1. *Accountant — Has no lien on books examined.*— Accountants who have done nothing to books of account beyond examining them at the request of the owner have no lien thereon for their services, and cannot upon that ground withhold the books from him. Scott Shoe Machinery Co. v. Broaker, 382.

2. *Municipal Court of the city of New York — Has no equitable control over its judgments — Attorney's lien, if existing, not enforcible.*— The Municipal Court of the city of New York, an inferior court of limited statutory jurisdiction, has no such equitable control over its judgment as empowers it to enforce an attorney's lien thereon by vacating, to the extent of the lien, a satisfaction executed by the client, and issuing execution for the lien. *Quære*, whether such a lien exists in that court? People ex rel. Jaffe v. Fitzpatrick, 456.

See **Attorneys.**

LIQUOR TAX LAW.

1. *Resubmission of local option because all the legal voters of a district had not opportunity to vote.*— The statutory local option questions must be resubmitted to the people of a town where proof is made to the Supreme Court that, owing to the failure of the officers of the town properly and sufficiently to redistrict it, there was such congestion at the polls of one district that all its legal voters had not opportunity to vote at the annual town election upon the said questions and that a considerable number of electors were standing in line waiting to vote upon them when the polls closed. Matter of Griffin, 532.

2. *Indictment imperfect only in form — Charging one crime — Joint sale of liquor and proof — Exceptions not appearing in the enacting clause of a statute need not be negatived by the prosecution — L.* 1896, *ch.* 112, § 31, *subd. a*, § 33; 1897, *ch.* 312, § 22 — *Code Crim. Pro.*, §§ 265, 278, 279, 284, 285.— An indictment, entitled "Supreme Court of the County of Rensselaer", is not demurrable for that reason, as the presence of the word "of" instead of "in", or a comma, will be deemed an "imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits", within Code Crim. Pro., § 285. An indictment which, in one count, charges the crime of selling liquor on Sunday, and, in another, the crime of offering and exposing it for sale on Sunday, the description of the date, place, persons and goods sold or offered for sale, being identical in each count, does not charge two crimes, but different aspects of the single crime described in L. 1896, ch. 112, § 31, and subd. a. A count, alleging that the defendant "unlawfully did sell to Charles H. Morris and to certain other persons whose names are unknown to the grand jury", charges only a joint sale to the persons indicated; the charge will be sustained by proof of one sale and not more than one sale can be proved under the count. A count, otherwise sufficient, need not allege that the defendant was not a hotel keeper, nor that the alleged purchasers of liquor were not his guests, or that the sales were made to them in the barroom or other similar rooms, as these provisos or exceptions of the statute need not be negatived by the prosecution since they do not appear in the declaratory or enacting portion of said section 31, as amended by L. 1897, ch. 312, § 22, but are found in a subsequent independent part of the section and moreover do not relate exclusively to sales on Sunday. People v. Haren, 590.

3. *Computation of radius of two hundred feet — Door of saloon — Door out to prejudice an applicant.*— The entrance, from and to which, distance is to be computed in determining what buildings, if any, are within a radius of two hundred feet of a proposed saloon, is the one opening into the wall of the saloon building rather than a door set back from the wall in the entrance way. Where the owner of a building, occupied exclusively for a dwelling, cut a new door thereto after the saloon keeper had paid his license fee and finished the door on the day when the certificate was issued and made the door apparently

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LIQUOR TAX LAW — Continued.
to affect the right to procure the certificate — which the said owner here contests — the court held that this new door could not properly be considered in determining the saloon keeper's right to a certificate. Matter of Cheney, 598.

4. *Form of town clerk's notice of submission of local option — Resubmission refused where there were only possible slight defects in posting and publishing.*— A town clerk's statutory public notice that the local option questions will be voted upon at the next town meeting need not state that all of the four questions will then be voted upon nor need they be set out in full. The notice is sufficient where, under the heading "Local Option To determine whether liquors shall be sold under the provisions of Section 16, Chapter 367, Laws of 1900, known as the Liquor Tax Law", it proceeds to state that a vote will be taken by ballot "upon said proposed questions" at the next town meeting. The statute, in so far as it relates to notice, is merely directory, and where it appeared that there might possibly have been slight errors in the posting and publishing of some of the notices, the court held a resubmission unnecessary and unjustifiable. Matter of Woolston, 735.

LOCAL OPTION.
See **Liquor Tax Law.**

MANDAMUS.
Municipal Court of the city of New York — Review of refusal to remove action to another district — Lies where justice refuses to receive motion papers. — An alleged wrongful refusal of a justice of the Municipal Court of the city of New York to order a removal of an action to another district of the court should be reviewed by appeal and a writ of mandamus will not lie against the justice. Where, however, the justice refused to receive or file motion papers, for a rehearing of the motion for a removal, which the defendant deemed essential to a proper review of the adverse decision, the court ordered a peremptory writ to issue compelling the justice to file the papers to the end that they might be made a part of the record. People ex rel. Jaffe v. Bolte, 53.

See **Office and Officer; Telephone Companies.**

MASTER AND SERVANT.
Services — Statute of Frauds — Abandonment — Damages.— The invalidity of a contract for services by its terms not to be performed within a year is not available to the master to defeat a recovery by the servant of his agreed compensation where he has been permitted to perform and has performed upon his part. In such case the void contract may afford a measure of the value of the services. Where however the servant performs services for only ten months of the stipulated term of one year and then abandons without the master's consent, he cannot recover under the contract, nor does his stipulated yearly salary afford a measure of the value of his services for ten months. Scheuer v. Monash, 276.

MECHANIC'S LIEN.
1. *Subcontractors' lien not cut off by contractor's general assignment — Construction of L.* 1897, *ch.* 418, § 15.— Mechanics' liens, filed within ninety days after the completion of the work, by subcontractors because of the contractor's failure to pay them, are not cut off by his assignment for benefit of creditors delivered before the liens were filed, and the general assignee must, where, at the time of the assignment, the owner owed the contractor moneys sufficient to satisfy the liens, satisfy them before any of the assigned estate can be applied to the debts of the contractor's general creditors. *Semble*, that where the liens are filed in time, they cannot be cut off by a general assignment of the contractor delivered and recorded before the liens were filed. The provisions of the Lien Law (L. 1897, ch. 418, § 15) declaring that no assignment of a contract, for labor or materials to improve real property, or of money due or to become due therefor, shall be valid until the contract and assignment, or a statement or a copy thereof, are filed in the office of the county clerk of the

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MECHANIC'S LIEN — Continued.
county where the property is situated, have no application to a general assignment of the contractor and relate only to the case of a special assignment made by him for value. John P. Kane Co. v. Kinney, 1.

2. *Discharge by undertaking where there are several owners* — *L.* 1897, *ch.* 418, § 18, *subd.* 4.— Where a mechanic's lien is filed against property, consisting of two lots owned separately, for work, labor and materials furnished thereon to a person who has contracted to buy both lots, it is not necessary that all three of the "owners" should execute the undertaking required by the Lien Law to discharge the lien and any one of them may do so. Miller v. Schmitt, 231.

See Contract.

MORTGAGE.
Reassignment by mortgagor after payment and surrender — *Equities* — *Code C. P.*, §§ 829, 835.— Where a wife mortgages property given her by her husband, thereafter reconveys it to him by warranty deed upon his promise subsequently executed to will her a life estate in all his property provided she pays the liens upon his real estate, and after paying the bond and mortgage and taking an assignment of them after his death, assigns them and thereafter induces another party to buy them of her assignee, for her advantage, she tacitly representing them as valid, the purchaser may enforce them against her life estate, as she has estopped herself; but he cannot enforce them against the heirs or executors of her husband as she has become, as to them, the principal debtor and has paid the debt, a duty in the proper performance of which they have an interest. An assignee of a mortgage takes it subject not only to all equities of the parties to it, but to equities which third persons could enforce against the assignor. Testimony of the husband's attorney and executor as to the facts of the transaction between the husband and wife, when she reconveyed to him upon his promise to provide for her by will, is not excluded by Code C. P., § 835, nor by section 829, nor because the plaintiff in foreclosure, the person to whom the wife assigned the mortgage, was not present at the transaction. Mertens v. Wakefield, 501.

See Electric Light Companies; Foreclosure.

MOTIONS AND ORDERS.
Amendment — *Of answer, denied for defective papers and laches.*— A motion to amend an answer must be denied where the proposed amended answer is not verified by the defendant, where he does not make the affidavit for the motion, and where no reason is disclosed why he did not. Such a motion, involving the denial of matter theretofore admitted, should not be granted where the defendant does not make it until the case is on the day calendar for trial. Diehl v. Robinson, 234.

See New Trial.

MUNICIPAL CORPORATIONS.
See Contract; Deeds; Injunction; Taxpayer's Action; Tenement Houses.

MUNICIPAL COURT OF NEW YORK.
1. *Jurisdiction of non-resident* — *How challenged.*— Where a defendant proposes to challenge the jurisdiction of a court he should appear specially and raise the question by motion and therefore an answer which begins by stating that the defendant answers "without conceding jurisdiction of this court" is insufficient to raise the question. A non-resident of the city of New York may be sued in its Municipal Court by a long summons if he has a place in the city for the regular transaction of business, and, therefore, where he is so sued within the city, he cannot overcome the presumption that the service was proper and oust the court of jurisdiction unless he shows not only that he was a non-resident but also that he had no place in the city for the regular transaction of business. Schillinger v. Herrmann, 280.

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MUNICIPAL COURT OF NEW YORK — Continued.

2. *Irregular amendment of summons changing the defendant's name — "Agent" of defendant — L.* 1882, *ch.* 410, § 1294.— Where a summons of the Municipal Court of the city of New York is not in the proper name of the defendant and contains no statement that the name by which he is designated is fictitious, and he does not appear on the return day either in person or by an agent or by an attorney, the court has no power then to amend the summons to the proper name of the defendant and render judgment against him by that name. The presence of the defendant's wife in the Municipal Court on the return day, in order to explain her husband's absence, does not make her his "agent" within the Consolidation Act (L. 1882, ch. 410, § 1294). Stromberg v. Carnese, 289.

See **City Court of New York; Lien; Mandamus; Undertaking.**

NATIONAL BANKS.

See **Banks.**

NEGLIGENCE.

1. *Failure to provide a freight elevator in New York city with trap-doors and a substantial guard or gate — L.* 1892, *ch.* 275, § 28.— The act creating a department of buildings in the city of New York (L. 1892, ch. 275, § 28), and requiring any hoistway or freight elevator or well-hole, not of fire proof construction, to be protected by "a substantial guard or gate and with such good and sufficient trap-doors with which to close the same", as may be directed and approved by the city superintendent of buildings, also declares that trap-doors need not be closed until the close of business, and hence, where a person is injured during business hours by falling down the elevator shaft of premises because the guard chain of the shaft broke when he leaned against it, he cannot recover damages of the owners of the premises upon the ground that they had failed to provide the elevator shaft with the statutory trap-doors as the presence of open trap-doors would not have prevented the accident. An iron chain firmly fixed in the wall of an elevator shaft at one of its ends and hooked at the other end into an eye-bolt or staple set into the opposite wall, and apparently in proper condition, is a sufficient compliance upon the part of the owners of the building with the said statute requiring "a substantial guard or gate" for the shaft. Weinberger v. Kratzenstein, 74.

2. *Erroneous charge as to contributory negligence.*— In an action based upon negligence, it appeared that the plaintiff was injured because he jumped back from a carriage against the shaft of the defendant's cart. The court instructed the jury that the plaintiff must show himself free from any contributory negligence such as might have brought about the accident and that he must also establish that the negligence was entirely that of the defendant. Held, that the charge was erroneous in both branches and that the plaintiff was only bound to show himself free from any negligence which contributed proximately to the accident. Brick v. Metropolitan St. R. Co., 135.

3. *A child of four years run over by a horse-car while being led by a child of eight years.*— In an action, by an infant aged four years, to recover for injuries received by being run over in the daytime by a horse-car of the defendant, it appeared that he was being led by his sister aged eight years, that it was twelve and one-half feet from their sidewalk to the rail where the accident happened, that when the children started to cross the street the car was distant from twenty-five to one hundred feet, that its horses were going very fast down an incline, that the driver was looking back into the car and had not his hand on the brake, that the plaintiff became confused, broke away from his sister, got on the track and was run over. Held, that it was erroneous to dismiss the complaint. That the driver was clearly negligent, and that the questions whether the girl of eight years was *sui juris*, and, if so, whether she was negligent, should have been submitted to the jury. Goldstein v. Dry Dock, East Broadway & B. R. R. Co., 200.

4. *Allegations permitting proof of earnings of injured person.*— Where the complaint, in an action to recover damages for injuries received in boarding

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NEGLIGENCE — Continued.
a street car, alleges that the plaintiff "was prevented from attending to her duties as a manufactory employee", she is entitled thereunder to testify upon the trial how much she earned as wages as a basis for the recovery of her loss of wages. Russell v. Metropolitan St. R. Co., 293.

5. *Duty to look both ways at a street railroad crossing.*— Upon crossing the tracks of a street railroad company, running north and south, it is the duty of the driver of a wagon, proceeding from west to east, to look for cars coming from both the north and the south, and he is guilty of contributory negligence if he fails to do so. Vonelling v. Metropolitan St. R. Co., 301.

6. *Insufficient damages.*— Where the plaintiff is permitted, in an action predicated upon negligence, to recover the reasonable expenses of medical attendance upon him made necessary by his injuries, the judgment must be reversed, at his instance, where he is allowed no recovery for the injuries themselves. Katz v. Brooklyn Heights R. R. Co., 302.

7. *Explosion of a purchased seltzer water siphon.*— The mere explosion of a siphon of seltzer water (manufactured by third parties), filled in the usual manner, with the usual liquids, and sold for seltzer water, cannot, without more, raise a presumption of negligence in the vendor sufficient to enable the vendee to recover of him for injuries received from the explosion, nor is a situation presented where the vendor can be held liable as for the sale of an article apparently harmless but really dangerous. Glaser v. Seitz, 341.

8. *Maintaining scaffold in safe condition — Contributory negligence.*— Under the Labor Law (L. 1897, ch. 415, § 18), an employer is not only bound to furnish his employee a safe scaffold, but he must maintain it in the condition which the statute requires shall be created in the first instance. Where a laborer using a wheelbarrow was thrown from a scaffold made of planks, with planks overlapping the joints, because, preparatory to removing the scaffold, an overlapping plank, which might have prevented the accident, had been removed by order of his foreman at a time when the laborer was below, the court held the laborer entitled to recover because the scaffold had not been left in a safe condition; and further held that the fact that he, when ordered by the foreman to go on the scaffold, failed to observe the absence of the overlapping plank, raised no question of law but only one of fact as to his contributory negligence. Healy v. Burke, 384.

9. *Contributory — Proximity to surface car made necessary by posts of elevated railroad.*— Where the proof, in an action for a husband's loss of his wife's services caused by the defendant's alleged negligence in running its electric surface car, shows that the posts of an elevated railroad in the street made it necessary for the wife to stand within two feet of the defendant's track in order to see whether its cars were approaching her street crossing, and that, while in this position, the fender of a car, coming very rapidly and without ringing a bell, caught her clothes, dragged her down and broke her leg, it is erroneous for the court to dismiss the complaint upon the ground of her contributory negligence. G'Sell v. Metropolitan St. R. Co., 387.

10. *New trial for concealment of a hernia caused by an accident.*— Where a woman, injured by a railroad accident and examined twelve days later by the company's surgeon, then makes no reference to any injury in her groin, and yet claims upon the trial of her action against the railroad company, more than eighteen months after the accident, that she has a large hernia, caused by the accident, then begun and which has since continued to increase, a verdict in her favor for $3,500 will be set aside upon the ground of the surprise to the defendant at the first proof of such a serious injury, and this although the complaint alleged that the plaintiff had sustained serious and lasting bodily injuries, injuries to her head, limbs and nervous system, and internal injuries. Dixon v. Brooklyn Heights R. R. Co., 422.

See Bill of Particulars; Damages; Railroads.

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NEGOTIABLE INSTRUMENTS.

1. *Bills and notes — Consideration — Rebuttal of presumption arising from an exchange of notes.*— Where the holder of a promissory note proves by the maker (who alleges that he received no consideration for it and that the holder cannot enforce it because the holder bought it at an usurious discount) that, on the day he delivered the note to the assignor of the holder, the maker received from the assignor his note of the same amount and maturity, the maker is entitled to show in rebuttal what occurred when the assignor gave him his note, as the maker is entitled to rebut the presumption of exchange which arises from the similarity in the date and tenor of the notes. Mutual Loan Assn. v. Brandt, 270.

2. *Wrongful diversion — Notice.*— The right of a holder of wrongfully diverted negotiable paper, acquired by him for value and before maturity, to recover thereon cannot be defeated without proof of actual notice of the defect in title, or bad faith on his part evidenced by circumstances. A *bona fide* purchaser of negotiable paper is not bound at his peril to be on the watch for facts which might put a very cautious man on his guard. Ketcham v. Govin, 375.

3. *Corporation — Contract made before its organization — Admissions of officers.*— A foreign corporation named The Union Cloak & Suit Co. cannot be held liable on renewal notes made by a domestic corporation under its name of The Union Cloak Co. where the merchandise debt represented by the notes was created before the foreign corporation was organized and it never received any benefit of the goods nor any other consideration for the notes. Statements of officers of the foreign corporation, made to the payees of the notes, that it used the name Union Cloak Co. in signing its notes, and that the corporations were the same, cannot in such case make the foreign corporation liable to the payees. Ginsburg v. Union Cloak & Suit Co., 389.

NEW TRIAL.

Motion for new trial on newly-discovered evidence — Code C. P., § 997.— A motion for a new trial on the ground of newly-discovered evidence will not be denied because the evidence is cumulative, provided it has such probative force as might change the result. Such a motion should be heard on a case settled and signed by the trial judge, but the objection that this practice has not been followed is not available on appeal where it was not taken on the motion. Such a motion should only be granted on terms. Solowye v. Hazlett, 197.

See **Criminal Law.**

NEW YORK CITY.

See **City of New York.**

NUISANCE.

1. *Upper proprietor when not liable to lower for surface water running down.*— Where city properties lie one above the other on a side hill, the owners of the upper one are not liable to the owner of the lower one because of surface water and melted ice and snow which ran down thereon, following the formation of the land, provided the owners of the upper one have not permitted thereon any improper accumulation of water, ice and snow. Garrett v. Wood, 397.

2. *New York city — Dumping board at foot of E. 80th street enjoined as a nuisance — L.* 1887, *ch.* 697; 1888, *ch.* 272; 1889, *ch.* 257.— The statutes, under which the city of New York was empowered to condemn land between E. 64th and E. 86th streets on and along the East river and construct thereon an exterior street and wharf running to the bulkhead line, contemplated the construction and maintenance of these solely for street purposes and the public use. The said statutes do not authorize the city to maintain, along the outer end of a wharf constructed by it at the foot of E. 80th street, a long dumping board for ashes, street sweepings and rubbish, and particularly where it pro-

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NUISANCE — Continued.
jects far beyond the bulkhead line and has under it compartments to sort out articles of value found in the refuse; and therefore owners before condemnation, abutting on the exterior street at this point, prejudiced by floating ashes and offensive odors, and deprived of the use of the wharf, in case they require it, by the dumping board may restrain the maintenance of it as a nuisance, although the exterior street improvement remains unfinished — it appearing that the city has had four years' time in which it might lawfully have completed it. Coleman v. City of New York, 664.

See **Injunction.**

OFFICE AND OFFICER.

1. *Term cannot be prolonged by the legislature — Const. of* 1894, *art. X*, § 2; *L.* 1897, *ch.* 378, §§ 1392, 1394 — *Mandamus.*— An extension of the terms of office of city magistrates of the city of New York by an act of the legislature is in effect an appointment by the legislature for an additional term, and such act therefore violates section 2 of article X of the Constitution which requires existing city officers to be elected by the electors of the city or some division thereof or to be appointed by such authorities thereof as the legislature shall designate. The said constitutional provision covers the duties of the offices it refers to, and a change in the name of the office does not take it outside of the said provision. An elector of the city of New York is entitled to a writ of mandamus compelling the mayor to appoint, notwithstanding such act. Matter of Kelly v. Van Wyck, 21.

2. *Commissioner of jurors of Kings is a local officer and an aid to the court — Constitutionality of L.* 1901, *ch.* 602 — *Compulsory delivery of books and papers under Code C. P.*, § 2471*a*.— The commissioner of jurors of the county of Kings is not a county but is a local officer, aiding in the administration of justice within a prescribed territorial limitation by obtaining, under the supervision and direction of the court, qualified jurors for it. Where his office is not elective, he need not be appointed by the board of supervisors or other county authorities of Kings, as required in the case of county officers by article X, section 2 of the Constitution of 1894, and hence chapter 602 of the Laws of 1901 authorizing State officers, a majority of the justices of the Appellate Division of the Second Department, to appoint him, is constitutional. Where the incumbent of said office under a term unexpired, refused, upon the ground of the unconstitutionality of said act, to surrender the books and papers of the office to the appointee of a majority of the justices of said Appellate Division as required by said act, and the appointee proceeded under Code C. P., § 2471*a*, to compel a delivery of the same, and the allegations of his motion papers were not denied by the incumbent nor any papers submitted by the latter other than a brief, the Special Term considered that all the allegations of the moving papers must be taken to be true and that the questions of the constitutionality of the statute and of the title to the office thereunder were directly involved. That, as the title of the applicant to the office was, under the statute clear and free from doubt, the relief asked by him should be granted notwithstanding the general rule that the title to an office is not to be tried upon such a motion. Matter of Brenner, 212.

See **Constitutional Law.**

PARTIES.

See **Accounting; Bankruptcy; Corporations.**

PARTITION.

Equitable conversion — Not maintainable by a distributee under a will where it directs an equitable conversion.— The question of equitable conversion is largely one of intent and such an intention upon the part of a testator may be found although the power to sell contained in his will is not in terms imperative. Where the provisions of a will work a conversion of the testator's realty into personalty and vest the latter in a trustee, a child, entitled to a distributive share of the proceeds, takes no title to the realty and therefore cannot maintain an action to partition it. McGowan v. Tifft, 603.

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PARTNERSHIP.

1. *When one partner may sue another at law — Contract — Mutuality — Offer and acceptance.*— One partner may sue another at law where the cause of action does not require an accounting of their joint transactions. A contract which has not the element of mutuality is void. An offer may be withdrawn at any time before the other party has acted upon it. Farmer v. Putnam, 32.

2. *Test of inter se — Intent — Share of profits as compensation and accounting therefor at law — Vacation of an attachment refused where it was disputed whether the action was legal or equitable and the merits were involved.*— The intent of the parties as shown by all their agreements and acts governs, in part, the decision of the question whether they were partners. The fact that one of them was to receive as compensation a share of the profits, requiring for its determination an accounting, does not decisively determine that the arrangement was a partnership nor is an action in equity necessary to such an accounting as it may be had in an action at law. Where the plaintiff sued a foreign corporation at law to recover, as he alleged, a share of the profits of certain contracts as compensation for having procured them for the defendant as its agent and obtained in the action an attachment accompanying the summons, and the defendant gave evidence upon the trial, still pending before a referee, that the parties were partners, and it appeared that a motion to dismiss the complaint upon the ground that the action was one at law, that the plaintiff's own evidence had established the partnership and that there could be no recovery under the complaint had already been denied by the referee, the Special Term refused, pending the action, to vacate the attachment — on the defendant's alleged ground that the action was equitable and therefore an attachment could not be granted therein — for the reasons, first, that the referee had already denied that contention during a trial unfinished and, second, because the question affected the merits of the action and they ought not to be decided upon such a preliminary motion. Schultz v. Brackett Bridge Co., 595.

PATENT.

See **Deeds.**

PENAL CODE.

§ 117. People v. Herlihy, 711.
§ 154. People v. Herlihy, 711.
§ 528. People v. Hart, 182.

PENSIONS.

See **Decedents' Estates.**

PLEADING.

1. *Amendment — Foreign joint-stock association sued as a partnership — Mistrial — Code C. P.*, § 1919.— A complaint will not be dismissed as failing to state facts sufficient to constitute a cause of action merely because the plaintiff has sued a foreign joint-stock association as a partnership, the objection being taken in the first instance upon the trial. The court, in the interests of justice and in the absence of proof of the foreign law, will treat the proceeding had as a mistrial, will assume that the proper officer of the association was served, that his official designation was omitted by the plaintiff in the title of the action, and will permit the latter to amend, on terms, so as to bring the matter within Code C. P., § 1919, permitting an action against the president or treasurer of a joint-stock association. Messler v. Schwarzkopf & Dorer, 72.

2. *Counterclaim — Code C. P.*, § 501, *subd.* 1.— Where vendors bring replevin against the receiver of an insolvent firm of vendees in order to retake certain goods alleged to have been obtained of the vendors by the firm through fraud and to have come into the hands of the receiver, a counterclaim alleging that the sheriff did not seize the goods described in the requisition to him, but took a distinct lot of goods which never belonged to the vendors and which they

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PLEADING — Continued.
were not entitled to take at all, is demurrable, as the counterclaim does not arise out of the contract or transaction set forth in the complaint and is not connected with the subject of the action. Marshall v. Friend, 101.

3. *Failure to folio papers — General Rules of Practice No.* 19.— Where an affidavit and order extending the defendant's time to plead are not folioed, the plaintiff has a right to return them within twenty-four hours. Silleck v. Dahut, 134.

4. *Action by assignee for wrongful discharge — Real party in interest — Non-residence of assignor — Action for wages distinguished — Reply to counterclaim for assignor's failure to account.*— Where the plaintiff sues as assignee for value of a claim for damages for wrongful discharge by a foreign corporation and the assignment is denied by the corporation's answer, further allegations thereof that the plaintiff is not the real party in interest are not good as a separate defense as the plaintiff is legally entitled to the claim and its ownership can be fully investigated under the denial of an assignment. An allegation that the plaintiff's assignor is not a resident of the State of New York does not constitute a defense, since the plaintiff, as a resident, is entitled to sue in our courts although his assignor might not be competent to sue. An allegation that another party is suing the foreign corporation as assignee of the same assignor in order to recover for the services rendered under the same contract of employment is not good as a separate defense, as an action for a wrongful discharge and one for wages earned before dismissal are independent causes of action. Where the defendant's counterclaim, that the plaintiff's assignor has failed to account for a part of certain moneys entrusted to him by the defendant for its benefit, is denied by the reply, the plaintiff may go farther and allege and prove affirmatively and as a separate defense to the counterclaim that his assignor has fully accounted for all the moneys thus entrusted to him. Smith v. New York Cooperage Co., 203.

5. *Denial.*— Where an answer, interposed to an action brought for the breach of an oral contract to employ the plaintiff at a fixed compensation and for a fixed term, denies each and every allegation of the complaint except that the defendant employed the plaintiff, the period of employment is a material issue; and it is therefore erroneous for the court to charge the jury, at the request of the plaintiff, that "There has been no denial of the contract on the pleadings." Margolies v. Ernst, 268.

6. *Amendment — Refused, after judgment, when changing the nature of the action.*— Where the conditional vendor of a chattel recovers a money judgment against the vendee upon his default, in an action for goods sold, the vendor cannot thereafter procure the justice to amend his return so that it shall appear that the complaint was for conversion, nor will the vendor be permitted to appeal from the judgment in his favor in order that it may be amended so as to state that the defendant is subject to arrest and imprisonment. Malawista v. Malzoni, 295.

7. *Insufficiency — Repetition of denials in a defence — Denial on information and belief — Partial defence — Code C. P.*, §§ 500, 507, 508.— A defence cannot be struck out for insufficiency, the remedy being by demurrer. Introductions to each of several defences in the words: "And repeating the allegations and denials hereinbefore set forth as completely as if herein fully set forth" must be stricken out as irrelevant and redundant, as a defence must be complete in itself and must consist of new matter, outside of the issues raised or which can be raised by a denial. An allegation that "the defendants denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of the complaint numbered first, second and third" is not a denial that the defendants have any knowledge or information, and besides is bad as a denial in gross, instead of a denial of each allegation. If a defense is not pleaded as partial it is to be taken as complete, and

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PLEADING — Continued.
therefore, the pleader cannot be compelled to state whether it is partial or complete. Burkert v. Bennett, 318.

8. *Misjoinder — Complaint stating only a single wrong — Charge of conspiracy surplusage.*— A complaint which, in its first count, alleges an improper ejection of the plaintiff's property from his law office in the building of the defendant and claims therefor treble damages, and which, in its second count, alleges the same acts as done through a conspiracy between the officers of the defendant and a third person, the plaintiff's immediate lessor, and claims therefor general damages, states but one cause of action — for unlawful interference with his property and tenant rights — and therefore is not demurrable as improperly joining two causes of action. Horton v. Equitable Life Assurance Society, 495.

See Deeds; Indictment; Judgment; Libel; Liquor Tax Law; Motions and Orders.

POLICE.
New York city — Illegal reduction to patrolman of said city of a Long Island City police captain transferred upon consolidation — Construction of section 281 of the charter — L. 1897, ch. 378, sub. ch. VIII and §§ 279, 281, 283, 287, 288 and 299.— The charter of the city of New York passed in 1897 gave its board of police commissioners no power to reduce a lawfully appointed police captain of Long Island City, entitled there to a salary of $1,800 per annum and upon consolidation transferred under section 279 of the said charter, to the rank of a patrolman in New York city at a salary of $1,000 per annum. Where it appeared that, although he served as patrolman, he protested against the reduction in rank and against his services as patrolman and also began legal proceedings to procure recognition as a captain of the New York force, his administratrix was held entitled to recover of the city of New York salary for the term of his service therein upon the basis of the pay of one of its police captains, less what he had been paid in his lifetime as a patrolman and the assessment for the police pension fund. Section 281 of the said charter, empowering the said board "to fix and assign the rank, title, duties, powers and place of service of said transferred members" was intended to apply only to cases where a policeman of the consolidated municipality had been acting, prior to consolidation, in a rank, by a title, and with duties and powers, at variance with those named and specified in and for the force created by the said charter and was intended as a means of bringing him into conformity therewith, and not as authority to reduce his rank after consolidation. Buschmann v. City of New York, 607.

See Indictment.

PREFERENCE.
See Calendar.

PRINCIPAL AND AGENT.
See Agency; Attorneys; Brokers.

PRINCIPAL AND SURETY.
Sureties of a defaulting non-resident trustee, when liable without her accounting — Termination of trust — Payment over of fund not presumed — Admissions of trustee — Code C. P., § 2818.— Under a testamentary trust of one-quarter of a residuary estate for the benefit of one for life, with directions to divide, after his death, this quarter in the same proportions and among the same persons as the testatrix directed in the case of the other three-quarters, a non-resident remainderman was duly appointed trustee and decreed entitled to receive the fund. She was ordered to account after the death in 1894 of the beneficiary, was removed for neglecting to do so, a successor was appointed and the trustee never thereafter came within this jurisdiction or had any property in it. No decree was ever entered against the trustee establishing her liability or that of the sureties upon her bond. Held, that, under the excep-

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PRINCIPAL AND SURETY — Continued.
tional circumstances, the substituted trustee might maintain an action against the sureties to recover so much of the fund as did not belong to the remainderman, although there had never been an accounting or decree. That the death of the beneficiary, in 1894, did not terminate the trust, as it required the division, after his death, of the *corpus;* and that, therefore, the appointment of the substituted trustee was legal. That the plaintiff need not show affirmatively that the trustee had never paid over the fund, as the presumption was that she had not paid it over and still had it. That an admission of the trustee, that she had received the fund, made before her removal and while she was still trustee of a trust not wholly executed, was competent against her. Yates v. Thomas, 552.

PROMISE.
1. *Equity — Will compel a transferee to reconvey property acquired for a void consideration.*— Where the sole consideration for the conveyance of real and personal property is a promise which the transferee has not kept, equity will compel the transferee to reconvey even though the promise was void. Medical College Laboratory v. New York University, 80.

2. *For benefit of third person — Consideration — Identity of beneficiary.*— Where receivers, appointed in proceedings for the voluntary dissolution of a corporation and in other proceedings to foreclose a mortgage upon all its franchises, premises and property, convey, in connection with the corporation and the sheriff, all its assets for a price insufficient to pay all the expenses of the accounting and discharge proceedings of the two receiverships, and the grantees thereupon covenant to pay them, "as and when they may be ascertained", and the receivers covenant "to do all and everything and things which may be necessary to wind up said receiverships", an attorney for the receivers, who has subsequently been awarded by the Supreme Court compensation for services rendered the receivers on their said accountings and discharge, may recover such compensation of the grantees as upon a promise made by them for his benefit, although he had not been retained by the receivers when the grantees made their covenant. Traver v. Snyder, 261.

PUBLIC HEALTH.
Milk regulation — Honorably discharged soldier not exempt — When a license fee is not a tax — L. 1893, *ch.* 661, § 21; 1896, *ch.* 371.— A regulation of a city board of health, requiring a vendor of milk in the city to register his name each year with its clerk before receiving from the board a permit or license to sell milk in the city for one year, is a reasonable regulation in the interests of public health and is authorized by the Public Health Law. A soldier, honorably discharged from the service of the United States and as such authorized by statute (L. 1896, ch. 371) to sell within the State of New York goods, wares and merchandise by procuring a license therefor, the same to be issued to him without cost, must register yearly if he wishes to sell milk in the city, and where, his license or permit having expired, he refuses to register again and continues selling thereafter, he subjects himself to the penalty imposed by the regulation upon one who holds himself out as possessing a license or permit, when he has none. The fact that the board of health usually requires from others, not exempt therefrom, a fee of one dollar for the registry and license does not make the regulation void as to the honorably discharged soldier, as upon the facts the fee cannot be deemed a tax nor to have been exacted for the purpose of raising revenue. City of Gloversville v. Enos, 724.

RAILROADS.
Elevated — Consent of abutting owner as an estoppel — Damages where only a distinct part of a hotel fronted on the street where the railroad ran.— An abutting owner who consents to the construction of an elevated railroad in the street in front of his premises cannot subsequently recover of it damages for its operation. Where a hotel owned and operated under a single man-

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RAILROADS — Continued.
agement consists in part of a distinct building, fronting on a street in which an elevated railroad is operated, conveyed separately, and having its original walls standing but perforated to give access to other parts of the hotel, damages may properly be awarded the distinct building for the injury to its easements which resulted from the operation of the railroad in front of it, but none can be awarded for that remaining part of the hotel, which did not front on the street where the railroad ran. Shaw v. Manhattan Ave. R. Co., 47.

2. *Village street railway corporation — Its duty to pave in and outside of its permanent way — L.* 1892, *ch.* 676, § 98; 1901, *ch.* 494, § 1.— A franchise or contract, given in 1882 and renewed in 1894, by a village to a street railway corporation, now operated by electricity, contained the requirement that the space between the rails and for twenty inches outside of them, on both sides of the track, should be paved by the railway corporation with "small stone" and "that the same should at all times be kept in good condition." In 1899 the village required of the railway corporation a six inch excavation filled in with sand or gravel and covered with vitrified paving brick. The railway corporation refused to pave and the village, at its own expense, did the work it had required. Held, that the village could recover the expense of the railway corporation, as the village had a right to exact what it deemed a pavement suitable in 1899, and was not limited to requiring a pavement composed of "small stone." That the contracts or franchises granted by the village trustees, persons having limited powers, were not a defense, as the trustees could not give up the streets to private corporations nor surrender the right of the public to have the streets in proper condition for use. That the act (L. 1892, ch. 676, § 98), requiring a street surface railway corporation to keep its street way in repair as and when directed by the local authorities, did not impair the obligation of contracts, and that the act (L. 1901, ch. 494, § 1), ratifying pre-existing contracts between street railway corporations and villages, constituted no defense. Village of Mechanicville v. Stillwater & Mechanicville St. R. Co., 513.

See **Easement; Foreclosure; Injunction; Negligence.**

RECEIVERS.
Preference against, by lien.— Where a creditor of an insolvent firm fails to show that any of the proceeds of a renewal note, which he forwarded to the firm shortly before its failure to take up other notes of his and which renewal note the firm had discounted, ever came into the hands of the receiver of the firm, the creditor cannot claim a specific lien upon the assets as against the receiver since he is merely a general creditor. Matter of Dolge & Son, 107.

See **Foreclosure.**

REFEREE.
Reference — Cannot have an interest in the stenographer's fees — Excessive fees.— Where, at the beginning of a case, a referee therein makes a bargain with the stenographer for a share of the fees payable for copies of the testimony, the report of the referee must be set aside, as such an agreement is wrongful upon his part, casts suspicion upon his impartiality, tends unduly to prolong the reference, contributes to the admission of irrelevant and immaterial evidence and is a fraud and imposition upon the parties. A referee is to be censured for extravagant charges where, the amount of his fees having been left open at the commencement of the case, he endeavors after it has been closed to have his fees fixed by stipulation at $20 for each of 97 hearings, 68 adjournments and 94 days of deliberation upon his report, and subsequently reports in favor of the party who signed the stipulation and paid the fees, the opposing party having declined to sign. Dickinson v. Earle, 235.

See **Ejectment.**

REFERENCE.
See **Referee.**

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REMOVAL OF CAUSE.

Municipal Court of the city of New York — Removal to City Court.— Where the complaint, in an action for personal injuries brought in the Municipal Court of the city of New York, demands judgment for $245 with interest from a day stated, the case may properly be removed to the City Court of said city if the interest, if given by the jury upon the trial, would make the damages exceed $250 at the time when removal is sought. Lewis v. Metropolitan St. R. Co., 304.

See **City Court of New York.**

REPLEVIN.

1. *Failure to prove title — Judgment in, not supportable as one for a conversion.*— The plaintiff cannot succeed in replevin unless he proves title to the specific property which he seeks to recover, and where he fails in this respect he cannot maintain his action by proving a claim for the value of the property, as such claim is in distinct repudiation of any continued claim to the property itself. A judgment must be *secundum allegata et probata* and hence a judgment in replevin for the plaintiff cannot, by any tacit consent of the defendants, be supported as one for a conversion. Shapiro v. Lankay, 39.

2. *Conditional sale of mantels — Rights as between vendor and mortgagees of premises in which the mantels were put — Bona fides and notice — L.* 1897, *ch.* 418, §§ 112, 113 — *Replevin.*— Where a vendor of cabinet mantels, sold upon condition that the title shall not pass until full payment, files the conditional contract of sale in the manner required by law, his reservation of ownership is effectual from the day of filing against all subsequent purchasers, pledgees or mortgagees in good faith. Where the mantels have been placed in premises of the conditional vendee which he had mortgaged before the conditional sale and delivery, the mortgagees cannot hold the mantels as against the conditional vendor unless they show that they have made advances thereon between the date of the conditional sale and the filing of the conditional contract of sale, and further, that the advances were made in ignorance of the continuing title of the conditional vendor. Where defendants, in replevin, show no right of property or possession to the chattels in suit, possession should not be awarded them, and the complaint should merely be dismissed. Nichols v. Potts, 273.

3. *Action by an individual — An amendment cannot authorize him to replevy as an executor.*— Where the plaintiff sues as an individual, he cannot replevy property which he alleges, in his affidavit for the writ, that he owns and possesses as executor of a decedent. An amendment adding the word "executor" to the summons and to the affidavit for the writ of replevin is insufficient to confer jurisdiction, nor has the court power to amend, in this manner, an executed undertaking given by the plaintiff to procure the writ of replevin. Taylor v. Jackson, 300.

See **Damages; Sales.**

RES ADJUDICATA.

Judgment.— A judgment recovered by partners, for the defendant's negligence in having damaged the firm horse and wagon through a collision, cannot be introduced to charge the defendant in a subsequent action brought by one partner to recover damages for personal injuries which he sustained by the collision, as the doctrine of *res adjudicata* has no application where the causes of action are not the same and the plaintiffs are different. Cahnmann v. Metropolitan St. R. Co., 127.

RIPARIAN OWNERS.

See **Watercourses.**

RULES.

See **Calendar; Pleading.**

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SALES.

1. *The vendee must establish affirmatively a right to rescind — Charge as to burden of proof.*— Where an action for goods sold is defended by the vendee upon the ground that the vendor gave him a privilege to return such of the goods as he had failed to sell and that to that extent he had a right to rescind, he must prove such right by a preponderance of evidence, and hence a charge of the trial court that the defendant had the "burden of proof" upon the question of rescission is not harmful nor calculated to mislead the jury. Keller v. Strauss, 35.

2. *Failure to prove delivery — Remedy of vendor by action for the price.*— An action for goods sold and delivered must fail as to the allegation of delivery where the proof is that, under orders from the vendee, a common carrier refused a stipulated delivery attempted to be made to it by the vendor and that thereupon the vendor took the goods away and kept them. *Semble*, that vendor should have sued for the price under a contract of purchase and sale. Butler Brothers v. Hirzel, 143.

See **Contract.**

SAVINGS BANKS.

Void payment to foreign administrator — Notice — Inquiry.— A domestic savings bank is not protected in paying a deposit to a deceased depositor's foreign administrator upon his production of a certified copy of his letters where a domestic administrator of the depositor had already been appointed, in the county where the savings bank was located, five months before the foreign administrator's appointment, as the presentation of the foreign letters put the bank on inquiry and required it to search the records of its own county at least for the appointment of a domestic administrator. Maas v. German Savings Bank, 193.

See **Executors and Administrators.**

SCHOOLS.

See **Bonds; City of New York; City of Troy; Constitutional Law.**

SERVICES.

1. *When inferred to be "satisfactory" to employers.*— Where a foreman is employed for one year at a weekly salary and is also promised a weekly bonus if his services during the term are "satisfactory" and this is coupled with a proviso that he may be discharged at any time if his services are not "up to our (his employers') expectations," in which case he shall receive no bonus, the completion by the foreman of his term of service sufficiently indicates that his services were "satisfactory" and precludes the employers, in an action by the foreman's assignee to recover the bonus, from proving that they were unsatisfactory. Fischer v. Conhaim, 125.

2. *Improper arbitrary discharge.*— An employer cannot arbitrarily discharge an employee serving under a contract providing that the employer may discharge should he "find" the employee unfaithful or improper in the performance of his duties or in any manner inefficient therein, as under such a provision a discharge can be made only in case the employer, for good and sufficient reason, finds the employee unfaithful, improper in performance or inefficient. Brall v. Clausen, 129.

3. *Contract when abated by death of employer.*— William Steinway, who died three months later, stated to the plaintiff, a teacher, that she "should give him all the time she had to spare to give German lessons to pupils, which he would send to her in a room in Steinway Hall, which he would let her have for that purpose, and that she would surely earn $15 a week for the time from the 21st of September, (1896) till the 30th of June, 1897". She promised to give him "all the time" and he promised to pay her one dollar a lesson for pupils sent her by him who did not pay her for their lessons. In an action by her against his executors, Held, that she could recover one dollar for each pupil sent by him and who did not pay. That the contract involved

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SERVICES — Continued.
a personal relation, as well as a personal selection of beneficiaries, and that it terminated with the death of William Steinway. Arming v. Steinway, 220.

4. *Evidence rebutting terms of alleged contract.*— Where an employee sues a contractor for his board and expenses under the latter's alleged agreement that if the servant went away to the place of employment and worked for a few months only the contractor would pay his board and expenses but that if he went for a year he would not pay them as it was a long job, and the employee testifies upon the trial that the contractor asked him to go because he was hard up for men, the contractor is entitled to show under such an unusual contract that there was no dearth of workmen of the employee's class and that he made no claim for board until after he was discharged. McDonald v. Alexander, 279.

See **Corporations; Decedents' Estates; Lien; Master and Servant.**

SPECIFIC PERFORMANCE.
Of written contract for the transfer of stock — Plaintiff must move promptly and come into court with clean hands.— While courts of equity do not absolutely deny their power to compel specific performance of a contract for the transfer of stock, they will not exercise the power where the plaintiff does not come into court promptly and with clean hands, as is the case where it appears that he has slept on his rights for thirty-three months, that during that time the situation of affairs, so far as concerns the real defendant, has changed, and that the plaintiff finally moved only at the promptings and for the benefit of others, who had indemnified him against an unfavorable result of his action. Ringler v. Jetter, 750.

STATUTE OF FRAUDS.
See **Deeds; Husband and Wife; Master and Servant.**

STATUTE OF LIMITATIONS.
See **Accounting; Banks; Decedents' Estates; Deeds.**

STATUTES.
See **Assignment for Benefit of Creditors; Benefit Societies; Bonds; City of New York; City of Troy; Civil Service; Constitutional Law; Corporations; Deeds; District Attorney; Elections; Electric Light Companies; Eminent Domain; Injunction; Interest; Liquor Tax Law; Mechanic's Lien; Municipal Court of New York; Negligence; Nuisance; Office and Officer; Police; Public Health; Railroads; Sales; Taxes; Telephone Companies; Tenement Houses; Towns; Transfer Tax; Trusts; Water Companies; Will.**

STAY.
See **Undertaking.**

SUBSTITUTION.
See **Attorneys.**

SUMMARY PROCEEDINGS.
An agreement not creating the relation of landlord and tenant.— The owner of premises can maintain summary proceedings to dispossess only in a case where the conventional relation of landlord and tenant exists between the parties, and that relation is not created by an arrangement under which the occupants are permitted to make the premises their home provided they board the owner and make necessary repairs. Schreiber v. Goldsmith, 45.

See **Landlord and Tenant.**

SUMMONS.
See **Municipal Court of New York.**

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SUNDAY.

Crimes — Trial on Sunday void — Code C. P., § 6, construed.— A trial on Sunday, for the offense of vagrancy, is not authorized by the common law nor permissible under section 6 of the Code of Civil Procedure, and therefore, a conviction and commitment rendered and made on that day are void. People ex rel. Donohue v. Walton, 320.

See **City of New York; Liquor Tax Law.**

SUPREME COURT.

See **Indictment; Jurisdiction.**

SURROGATE.

See **Judgment; Transfer Tax.**

SURROGATE'S COURT.

1. *Decree on accounting opened for newly-discovered evidence explaining why the funeral expenses of a testator were so large and why a note due him had not been collected — Costs — Code C. P., § 2481, subd. 6.*— The surrogate may in his discretion open a decree upon the ground of newly-discovered evidence but will do so only where the evidence is likely to change the result, is material, is not cumulative and could not have been obtained on the former trial or hearing by the moving party by the exercise of reasonable diligence. Where representatives of a deceased administrator, whose account had been surcharged with funeral expenses deemed excessive by the surrogate and with the amount of a promissory note due the testator, maturing soon after his death and never enforced nor collected, subsequently offered to produce to the court legal evidence that the intestate himself had selected an elaborate and expensive casket for his burial, had had it reserved for him and was buried in it, and further offered to show by the endorser of the note that both he and the maker were insolvent at its maturity, that certain other judgments against them apparently paid by them were not in fact so paid, and that the endorser had been out of the State of New York for most of the time since the maturity of the note, and the representatives further showed that knowledge of these matters had come to them since the decree and shortly before their application to have it opened, the surrogate opened the decree on payment by them of costs. Matter of McManus, 678.

2. *When a petition to sell real estate for debts need not show the value of each parcel — Citation, service and jurisdiction — Amendment — Terms of sale — Payment.*— In a proceeding to sell the real estate of a decedent for the payment of his debts, the petition need not state separately the value of each parcel where the parcels lie together. Where parties named in the citation have been served with it, the omission of the Christian names of some of them and the failure to state the individual names of others, who were partners in firms cited, may be cured by amendment. Service of the citation upon tenants of the decedent's real estate, not named in the citation, does not confer jurisdiction of the tenants. Where parties named in a citation die before service of it is made upon them, service of a citation in the same form upon their personal representatives does not confer jurisdiction of the parties deceased. Where the real property of the decedent is subject to a mortgage also covering the property of other persons, a sale, upon the announced terms, that the holder of the mortgage has consented that the purchaser may pay it off and that such payment will be allowed *pro tanto* in the proceeding as a deduction from the bid, is legal, and a purchaser, who signed the agreement of sale, cannot avoid the sale for such an arrangement as to payment. Matter of Georgi, 685.

See **Costs; Decedent's Estates.**

TAXES.

1. *Interest on, where a New York city assessment is reviewed by certiorari and reduced — Liability of city to refund — L. 1896, ch. 908, §§ 251, 253, 256.* — The allowance of a writ of certiorari to review an assessment of real prop-

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TAXES — Continued.
erty located in the city of New York for alleged overvaluation, inequality and illegality does not excuse the relator from timely payment of the tax, and therefore where she delays payment for more than a year and until the court has reduced her assessment she must pay interest on the true amount of taxes due, and this because of the provision of the charter of the city of New York (L. 1897, ch. 378, § 916), declaring that interest shall be paid on taxes remaining unpaid on the first day of January following the imposition of the tax. *Semble* that, in such case, the city is liable to refund, with interest, so much of the tax paid as represented an excessive assessment. Matter of Smallwood, 167.

2. *Waiver by assessors of a failure to file, with them, a verified statement of the respect in which an assessment complained of was excessive — L.* 1896, *ch.* 908, § 36.— A failure, upon the part of a complainant against an assessment as excessive, to file with the assessors, on review day, a statement under oath specifying the respect in which the assessment complained of is incorrect, as required by the Tax Law of 1896, is waived by the assessors, and cannot prejudice the right of the complainant to a subsequent review by certiorari, where the relator appeared before them on the review day and insisted that his valuation should be reduced, and they, without requiring of him the statutory statement, or objecting to its absence, or taking his evidence orally, reduced his assessment to some extent. People ex rel. Scobell v. Kilborn, 599.

See **Deeds; Towns; Transfer Tax.**

TAXPAYER'S ACTION.

To restrain the letting of a garbage contract — Defective complaint — Municipal officers should be protected.— A complaint by a taxpayer which alleges that the city commissioner of street cleaning, by his advertisement for bids for removing garbage, required the successful contractor to build and operate a suitable plant within thirty days although the commissioner knew that only one company specified in the complaint then had such a plant, and that a new one could not be built in thirty days, that although there were two other lower bidders he and the city board of estimate awarded the contract to the company specified, and that said board knew when it made the award that the price accepted was "extravagant", when unaccompanied by any allegations of fraud, fails to state a cause of action, as fraud is not to be presumed against municipal officers, it was their duty to let the contract, the charge that they knew that only one suitable plant existed is not an allegation nor proof that only one such did exist, the charge that they knew the price to be "extravagant" is not an allegation that it was excessive, and the statement that there were other lower bidders is not an allegation that those bidders were able and willing to comply with the conditions of the contract. Madden v. Van Wyck, 645.

TELEPHONE COMPANIES.

How far the discretionary power of village trustees over poles and wires may be controlled by the court — Motion papers, for a mandamus, which failed to show a relator — L. 1890, *ch.* 566, § 102; 1897, *ch.* 414, § 89, *subd.* 9; *Code C. P.*, § 1994.— Notwithstanding the fact that the Transportation Corporations Law gives a telephone company a franchise, direct from the Legislature, to use the public streets for constructing and maintaining its lines, the Village Law gives village trustees power to regulate the erection of the poles and the stringing of the wires, and as this latter power involves discretion, the Supreme Court, while able to compel its exercise in a proper case, cannot by mandamus control the particular method of the exercise. Where it appeared that village trustees had materially embarrassed or prevented a telephone company in its legal right to use the village streets and had long delayed passing any ordinance in the matter, the court refused to grant the company, in the first instance, a peremptory writ of mandamus requiring the trustees to grant it a permit to erect poles, string wires and conduct business in the village, but

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TELEPHONE COMPANIES — Continued.
gave it leave to renew the motion on other papers if the passage of such an ordinance should be unduly delayed. In view of the provisions of Code C. P., § 1994, that a State writ awarded upon the application of a private person must show that it was issued upon the relation of that person, the defect, in the motion papers of the company, that they are entitled only in the name of "The People" and do not name the company as relator or in any manner, is a mere irregularity which does not diminish the right to the writ, upon a proper case made, and cannot in such case preclude its subsequent issue in the form required by the Code. People ex rel. Monticello Telephone Co. v. Board of Trustees, 675.

TENDER.
Formal.— A formal tender of the principal is necessary to stop interest.— Czech v. Bean, 729.

TENEMENT-HOUSES.
Act for cities of the first class — Police power — Unreasonable requirement as to houses for which plans had been filed when the unamended act took effect — L. 1901, *ch.* 334, § 4, *amd. ch.* 555.— Section 4 of the new Tenement House Act (L. 1901, ch. 334, in effect April 12, amd. ch. 555, in effect April 25) providing in substance that in cities of the first class an incomplete tenement-house, for which plans complying with the law existing at the time of filing had been filed with the city department of buildings on or before April 10, 1901, for which excavation had been commenced on or before June 1, 1901, after official approval of the plans, and which was built in accordance with the law existing at the time of such filing, should be subject to such provisions only of the new statute as affected tenement-houses existing at the time of its passage, is a valid exercise of the police power, but the further requirement, that the first tier of beams of such a tenement-house must have been set on or before Aug. 1, 1901, is an unreasonable and oppressive exercise of that power and is therefore invalid. Signell v. Wallace, 656.

TITLE.
Marketable — Deed of a lot on a lane conveys fee to center — Record in partition considered.— In 1851 in an action of partition, in which the decree ordered the making of a map for the sale — which showed the lots and the general boundaries — a referee sold, as the record showed, all the property of an intestate in a certain locality, described in a deed to the intestate made in 1826 as bounded northerly by a road or lane, by the lot numbers on the map and in his deeds the referee described the parcels sold by metes and bounds which coincided with the map but he made no mention of the lane in describing the northern boundary. He made no separate sale of the lane and no claim to it has ever been made subsequently by the intestate's heirs. The lane was subsequently closed by the several owners whose lands it crossed, and was built upon, and a purchaser refused in 1901 to take title to one of these lots upon the ground that his vendor, a mesne grantee under the sale in partition, did not own that part of the lot which was represented by the lane. Held, that, under the rule of property that a grant of abutting lands conveys the fee to the center of the street or highway and in view of the public record in the action of partition, the fee in the lane to its center passed by the referee's deed and that the title was therefore marketable. Wise v. Curry, 634.

See **Deeds.**

TOWNS.
The lien created by filing a collector's bond may be foreclosed in equity — Principal and surety — When administrators may defend as to land — L. 1890, *ch.* 569, §§ 52, 53, 66.— The statutory lien imposed by the Town Law upon the real estate of a town collector, and that of his sureties, by the due filing of his undertaking of office may, upon his default in failing to pay over tax moneys which he has collected, be foreclosed in equity by the town supervisor,

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TOWNS — Continued.
as the remedy at law is not adequate. The inadequacy of the remedy at law considered. Where the collector deposited the tax moneys, now in default, with an insolvent banking firm of which one of his sureties, since deceased, was a partner, and these moneys passed into the firm assets and from thence into the hands of the general assignee of the firm and there remained, the court considered that the lands of the banker should be sold first in the action as he, or his estate, had become in equity the principal debtor to the town; and it further held that the town supervisor was entitled to payment before the other general creditors of the deceased surety, even if the latter's estate were insolvent. Where the complaint in the action alleges that the administrators of the deceased surety have or claim to have some interest in the premises which accrued subsequently to the lien of the undertaking, the administrators are entitled to defend upon the ground that the plaintiff has on the facts an adequate remedy at law. If the surety's personal estate were insolvent and the administrators had taken proceedings to sell his real estate to pay his debts, they would be necessary parties to the action. Chatfield v. Campbell, 355.

See **Elections; Liquor Tax Law.**

TRADEMARKS.

Soap manufacturers enjoined from using the words "Omega Oil," belonging to liniment manufacturers — Use of a distinctive color.— The owners of a trademark in the name "Omega Oil", a liniment, green in color and for which green has been adopted as a distinctive color, are, upon the ground of unfair competition, entitled to restrain manufacturers of a green medicated skin and scalp soap, employing therein small quantities of "Omega Oil" and putting the soap up in a green box and wrapper, from using the words "Omega Oil" as a part of the designation of their soap, as liniment and soap, upon the proof submitted to the court in this action for an injunction, are not of such a different character as to permit the soap manufacturers to use the name created and made valuable by the liniment manufacturers. The court further held that, if the soap manufacturers omitted from the designation of their soap the words "Omega Oil", it had no power to restrain them from using the color, green, in their soap and on its boxes and wrappers. Omega Oil Co. v. Weschler, 441.

TRADES UNIONS.

See **Injunction.**

TRANSFER TAX.

1. *Correction of order refused — Res adjudicata.*— A surrogate has no power to amend and correct an order by which a transfer tax was assessed upon a life interest in United States bonds, which were subsequently declared by the Court of Appeals to be exempt from taxation. If it be assumed that he has the same power over his orders which the Supreme Court has over its orders, relief should not be given the party who paid the tax where he paid it voluntarily and deliberately more than five years ago under a mistake of law, which was not discovered until after the Court of Appeals had rendered its decision upon the question of the taxability of such bonds. Matter of von Post, 367.

2. *Moneys of non-resident temporarily deposited within the State when not taxable.*— Moneys which a non-resident decedent had temporarily on deposit within the State of New York at the time of his death for the purpose of investing them in the stock of a foreign corporation are not subject to the transfer tax, although the decedent died before the transaction was completed. Matter of Leopold, 369.

3. *Exemption of a transitory deposit of a non-resident decedent — L.* 1896, *ch.* 908, § 220, *subd.* 3, *amd. L.* 1897, *ch.* 284, § 2.— A non-resident of the State of New York, who had sold his interest in a foreign railroad company

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TRANSFER TAX — Continued.
to a syndicate, for fourteen months before his death had on deposit, with a New York depositary of the syndicate stock, about $5,000,000 resulting from the sale of his own and this the depositary carried on its books merely as "deposits in trust" and was paying him certain interest thereon subject to the proviso that he should not draw more than $100,000 except upon two days' notice. In the meantime the depositor had been trying to invest the deposit but had failed to do so both because of his continuous ill health and of the magnitude of the deposit. Held, that the deposit was not "property within the State" within the meaning of the Tax Law, as amended in 1897, and therefore was exempt from the transfer tax. Matter of Blackstone, 585.

4. *Fund in litigation not taxable.*— Where a trust fund, alleged to form a part of the estate of a decedent, is claimed by her husband's heirs and proof is made that they intend to litigate their claim up to the court of last resort, no transfer tax can presently be imposed upon the fund nor hereafter unless the estate of the decedent shall succeed in the litigation. Matter of Newcomb, 589.

5. *Penalty for delay remitted for the time during which the fund has been in litigation — Notice of appraisal — Report.*— A penalty for delay in paying the transfer tax should be remitted for so much of the delay as has been caused by the fact that the fund was in litigation. An appraisal is not regular where the record does not show that the proper officers representing the People have had due notice. The report of an appraiser must show the grounds of his findings. Matter of Bolton, 688.

TRIAL.
See **Costs; New Trial; Venue; Witness.**

TRUSTEES.
See **Principal and Surety.**

TRUSTS.
1. *Void accumulation — Separable from scheme of distribution — Disposition of accumulation.*— Personal property can be accumulated only during the minority of beneficiaries (L. 1897, ch. 417, § 4), and therefore a testamentary direction to the trustees of a residuary estate that they shall pay the testator's widow a fixed sum for life from the income, accumulate any surplus income, and add it to the principal of the residuary estate, is unlawful. The unlawful accumulation does not, however, affect the validity of the life provision for the widow, nor the validity of prior, distinct and separable trusts for children of the testator, to which trusts the entire residuary estate is directed to pass in equal shares upon the widow's death. The accumulated income, and any excess of income accruing in the future, will pass to the last mentioned trustees as the persons presumptively entitled to the next eventual estate. Garland v. Garland, 147.

2. *Remainder — When vested by agreement to divide — Executed agreement not to be repudiated.*— *Semble*, where in a trust agreement it is provided that upon the death of the donor of a trust in personalty for whose life benefit to a fixed extent the trust was created, the *corpus* shall be divided between persons named in the instrument of trust, there is a vested remainder in such fund in said persons where they are certain and in being at the time when the agreement takes effect. Where the donor, besides his inalienable life interest or annuity, has or may have alienable reversionary interests in the *corpus* as donor, and agrees that a substituted trustee may distribute the *corpus* among the parties entitled in remainder — his annuity having been provided for in another manner — his reversionary interests, if any, pass, and neither he nor his executor will be permitted by equity to repudiate the agreement and recover of the substituted trustee the value of the *corpus* divided and distributed by it. Baltes v. Union Trust Co., 157.

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TRUSTS — Continued.

3. *Invalid accumulation — Of income not absolutely payable to a minor at majority — To pay mortgages — L.* 1896, *ch.* 547, §§ 51, 76; 1897, *ch.* 417, § 4. — Accumulation of the income of a legacy to a minor, where the income is not directed to be paid him at majority but is required in a certain contingency to be held in trust for him for life and thereafter to be distributed to other persons, is forbidden by statute and the illegal accumulation, when not otherwise disposed of, passes to the parties entitled to the next eventual interest or estate in the fund which produced it. Income of a trust cannot lawfully be directed to be applied to the payment of mortgages on the testator's realty, as this constitutes an illegal accumulation, which also passes to the owner of the next eventual estate. Matter of Snyder, 588.

4. *Implied — For the minority arising out of a foreclosure instigated by the majority stockholder — Consideration — Equities in the absence of actual fraud.* — Where a controlling majority stockholder in and the guarantor of the second mortgage bonds of an insolvent rapid transit company failed to pay the interest on the bonds from lack of proper resources and, upon a premeditated foreclosure and sale resulting from the default, bought the property in nominally by a new company, took all the new stock and, in lieu of paying the purchase price, issued bonds of the new company for those foreclosed, it was held that because of the irregularity of the transaction an implied trust in the new stock arose in favor of the minority stockholders to the extent of their interest in the old stock, and this notwithstanding the trifling value of that stock. But that, as no actual fraud was shown, the minority, to entitle themselves to the new stock, must within twenty days pay the majority stockholder their *pro rata* share of certain moneys it had paid, after the judgment in foreclosure and before the sale therein, for interest on the bonds foreclosed and, further, that the majority stockholder had as against them a lien for unsecured and unpaid advances theretofore made by it to the rapid transit company and also a lien for income bonds of the latter company which the majority stockholder held at the time of the judgment in foreclosure, and that, to secure this lien, the minority stockholders must deposit their new stock with the majority stockholder and pledge it. Cutting v. Baltimore & Ohio R. R. Co., 616.

5. *Assailable when created by a life tenant and remaindermen to avoid a judgment debt of their testator.* — Where a city has recovered a judgment against a debtor, whose will provided for the payment of his just debts and thereafter for a life estate in all his remaining property to his widow and executrix, she, where she has never accounted, cannot, by a trust created after his death by her and by his children, the lawful reversioners, for their benefit and covering his whole property, defeat the city from reaching the trust property and obtaining payment of its judgment. City of New York v. United States Trust Co., 639.

See **Actions; Deeds; Principal and Surety.**

UNDERTAKING.

Municipal Court of the city of New York — Approval of undertaking on stay — Code C. P., §§ 1335, 3050. — An undertaking to procure a stay on appeal of an execution on a judgment of the Municipal Court of the city of New York is expressly required, by the first clause of Code C. P., § 3050, to be approved by the justice rendering judgment or by a judge of the appellate court, and this requirement is not affected by the last clause of said section making section 1335 of said Code applicable to such an undertaking, which latter section, among other things, provides that "It is not necessary that the undertaking should be approved." Howley v. Kraemer, 444.

See **Mechanic's Lien.**

UNDUE INFLUENCE.

See **Will.**

VENDOR AND PURCHASER.

See **Title.**

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VENUE.

Place of trial — Change for convenience of witnesses — Accessibility of court. — A motion to change the place of the trial of an action upon the ground of the convenience of the witnesses is addressed to the discretion of the court and will not be granted merely because the defendant swears to the greater number of necessary witnesses. The relative accessibility, to all witnesses, of the courts in which the plaintiff and the defendant respectively wish to try the case is a matter material for consideration. O'Beirne v. Miller, 337.

VETERANS.

See **Public Health.**

VILLAGES.

See **Railroads; Telephone Companies; Water Companies.**

WARRANTY.

Breach of — Running away of a horse "kind and sound in all harness." — An action for a breach of a warranty that a horse is "kind and sound in all harness" is not sufficiently supported by proof that, after he had been driven safely for several hours before a hansom cab, he ran away for some unexplained reason, it appearing that the cab was not adapted to the conformation of his body, that he had previously been gentle, and that the driver was not called as a witness upon the trial nor his absence accounted for. Brown v. Horowitz, 287.

WATER COMPANIES.

Condemnation — Corporation organized to prevent a village from condemning a necessary water supply — Corporate property when not devoted to the public use — L. 1890, *ch.* 566, *art.* 7. — Where a village, in need of a water system, has duly voted and bonded itself for one and filed a map and plans therefor, in the proper offices, embracing the only adequate supply existing in the immediate vicinity of itself and of an adjacent village, it cannot, in equity, be prevented from condemning the lands containing the supply upon a disagreement as to price with a corporation organized, under the Transportation Corporations Law, in the other village, as alleged, to supply it with water, and which has bought the said lands, where it appears that that corporation has filed no map of them under the statute, has entered into no valid contract with its village binding it to supply that village with water, has, therefore, in no manner devoted the lands to the public use, and that the corporation was organized, two months after the first named village had filed its map and plans, in order to thwart it from acquiring the water supply. Village of Fultonville v. Fonda Water-Works Co., 426.

WATERCOURSES.

1. *City restrained from further pollution of a creek used for a sewer — Past acquiescence of riparian owner.* — Where a city has legally changed the channel of a creek so that it runs in an artificial bed to a neighboring lake, owners of land, which touches the new channel and is wholly bounded by the lake, may restrain the city from building an additional sewer, connecting with the creek and emptying near the owners' land, which will greatly increase the pollution of the creek and lake, it appearing that in spring floods the land is overflowed and large sewage deposits made thereon, which become extremely offensive when the waters recede. The fact that the riparian owners have acquiesced in the existing pollution of the creek affords no reason why they may not now object to acts of the city which time may ripen into rights. Gale v. City of Syracuse, 465.

2. *Lower riparian owner must show that a diversion of water above is material — His duty to make the loss as small as possible.* — A city which, for its water supply, has under legislative authority impounded certain streams tributary to the Sacandaga river is not liable, for damages resulting from the water thus diverted, to a manufacturer on the river, thirty-two miles below,

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WATERCOURSES — Continued.
employing both steam and water power, where it appears that at low water the water flowing in the river is one thousand times the amount diverted, that the amount diverted would create less than two horse power in a working day, that the manufacturer's dam is leaky and that he has long permitted it to remain so. *Quære*, whether the title to the bed of the Sacandaga river is in the State? Sumner v. City of Gloversville, 523.

WILL.

1. *Legacy — Lapse — Specific legacy upheld by intention as derived from the whole will.*— A specific legacy fails and the property bequeathed falls into the residuum where the testatrix makes the particular dispositions dependent on a memorandum to be made by her of even date with her will but which memorandum she in fact never made. Bequests, in amounts named, "of the following stocks and bonds now held by me (the testatrix)," enumerating them, and bequests of the sum of ..... dollars, par value of certain capital stock, enumerating it, are not sufficient in form to make the legacies specific, but will be so construed where, in other parts of her will, the testatrix refers to the stocks and bonds in the plural, guards them against inheritance taxes, prohibits her executors from selling them, and declares that, if sold in her lifetime, the legatees shall have in money what the securities would have brought at the time of her death. Cramer v. Cramer, 17.

2. *Construction — Blood of testator preferred.*— The second clause of the will of a testator devised and bequeathed the remainder "of my property * * * equally to my brothers and sisters, and their children living at the time of my decease, and also the father and brothers of my beloved wife and their children now living and who may continue to be living at my decease. And in the event of the decease of the issue of any one or more of my brothers and sisters before my decease, including those already deceased, as well as those who may decease, that then the issue of such issue shall take the share which its or their parents would have taken if living at my decease". Held, that the testator intended his estate to be divided *per capita* between his brothers and sisters and the children of such of them as might be living at the time of his death, and his wife's brothers and their children living at the time of his death — grandnephews and nieces of one stock together taking the share of their parent. That the testator did not intend to exclude the children of his surviving brothers and sisters from sharing in his estate and admit thereto children of his wife's surviving brothers, but that both had equal rights. That if any ambiguity had existed, that interpretation would be adopted which preferred the blood of the testator to strangers. Central Trust Co. v. Richards, 247.

3. *"Lawful issue" used in two senses in the same will — Defeasible remainder — Presumption of death.*— The will of a testator, who had a living sister, Eliza, and who had had five other brothers and sisters, who had died before him, gave one-third of the income of his residuary estate to his wife during her life, and of the remaining two-thirds he gave during the life of his wife one-sixth to Eliza, and the remaining five-sixths to the "lawful issue" of his deceased brothers and sisters *per stirpes*. In case of the death of Eliza and that of all of the lawful issue of his deceased brothers and sisters, the share of the income of the person dying was to be divided among the remaining beneficiaries. As to the *corpus* he directed that the trust should cease on the death of his wife, and that then the residue be divided between Eliza, if living, and the "lawful issue" of his deceased brothers and sisters, then living, *per stirpes*, "their heirs and assigns forever." If Eliza died before the termination of the trust her share was to be divided among the remaining beneficiaries. If all the issue of any one of the deceased brothers and sisters died before the termination of the trust, the share of the issue dying was to be divided among the surviving beneficiaries. Eliza died before the testator and the widow is still living. Held, that, in the provision as to income, the testator meant by "lawful issue" children, and that, in the provision as to the *corpus*, he meant by "lawful issue" descendants. That there was no incon-

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WILL — Continued.
sistency in interpreting the same word in the same will in different senses. That the residue vested, in the issue of the deceased brothers and sisters, a present estate defeasible by death before the termination of the trust. In 1873 a husband, who was on good terms with his wife, left her to better his condition, and wrote to her frequently until 1876, when he stated that he was in a hospital which he never expected to leave. He was never heard from thereafter, although his wife had in the meantime borne to him a child which he had never seen. Held, that he would be presumed to have died in seven years after 1876. Morrow v. McMahon, 348.

4. *Legacy — When charged upon land — Extrinsic circumstances showing intention.*— The will of a childless testator, first, gave legacies in money to his only brother and next of kin and to his adopted daughter, payable after the death of his wife, and, after giving a cemetery lot to the daughter, bequeathed to his wife all the residue of his property real, personal and mixed. Six years later and shortly before his death he, by a codicil, reaffirmed his will and directed that the income of the money legacies should go to and be used by his wife during her life. He did not change his real estate investments between the time of his will and that of his death. His personalty proved insufficient to pay more than two-fifths of the money legacies. The wife is dead. Upon a contest between her devisees and the testator's legatees, Held, that the language of the will and codicil, as well as the extrinsic circumstances, indicated that it was the testator's intention to charge upon his realty the deficiency of the money legacies. Wellbrook v. Otten, 459.

5. *Express trust — Form — Suspension of power of alienation — Gift of a house, the furniture, and "all the contents" does not include securities in a safe — Election as to dower.*— A testamentary direction to executors, as trustees, "To invest and keep invested so much of my said estate as may be personal, and to collect and receive the rents, issues, incomes and profits of so much of my estate as may be real property and to pay over after deducting all lawful expenses the net income arising from my property both real and personal" to certain beneficiaries named, creates, as to the realty, a valid express trust of the third class mentioned in the statute (L. 1896, ch. 547, § 76, subd. 3). The validity of a trust, created for two lives in being only, is not affected by the fact that a number of persons may be its beneficiaries during the term. A testator, who had given legacies of $36,000, married again and, by a codicil to his will, in which he expressed a desire that his will, except as limited thereby, should continue in full force and effect, gave his second wife his dwelling-house, "the furniture and all the contents thereof". A safe therein was found to contain securities to the extent of $114,000 and, beside these, he had only sixty dollars of personalty. Held, that the second wife was not entitled to the contents of the safe and, further, that they were not consonant with "furniture". Where the provisions of a will are not inconsistent with dower the widow is not put to an election. Fenton v. Fenton, 479.

6. *Setting apart fund to produce a fixed income — Disposition of excess — Devise, when not cut down — Abatement of general legacies — Legatee forfeits legacy by testifying to the factum of the will.*— Where a will directs executors to set apart and invest so much of the testatrix' estate as will produce an annuity of ten thousand dollars to her husband, the determination of the amount necessary to be set apart is in the discretion of the executors, and the court should not interfere. If there is an excess of income, it should be distributed among unpaid legatees of the will. Where a testatrix, who owned a family plot, a pew and a homestead, as well as certain real estate, after specifically devising the proceeds of her real estate to her brothers and sisters, devised all her "other" real estate to her executors in trust "for the execution of my will", with power of sale, the court considered that the first devise was not cut down, that the subsequent one related only to the plot, pew and homestead, and, further, that the proceeds of the latter were not thereby made applicable to the payment of the general legacies but would go to the brothers

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and sisters. Where the personalty is insufficient general legacies abate ratably. A subscribing witness forfeits his legacy under a will where he testifies to its execution. Morse v. Tilden, 560.

7. *Codicil as a republication.*— A testatrix named Ellen Campbell made a will on July 6, 1897, revoking all former wills and this she specifically revoked by a will made in 1899. On December 7, 1900, she executed a paper, headed "Codicil to the last will and testament of Miss Ellen Campbell, which will bears date July 6, 1897", and this contained no revocation clause whatever. Held, that the will of 1899 was not her last will. That the codicil amounted to a republication of the will of 1897 and made it speak, as modified by the codicil, as of the date of the codicil. Matter of Campbell, 572.

8. *Undue influence — Request to a nurse — Free access to a testator by objectors to the bequest.*— Where the wife of an aged paralytic testator, having a very considerable estate, three days before his death notified his attorney that the testator would like to see him at once and on his arrival left the attorney in the sick room with a nurse whom the testator had long employed, none of the family being present, and the nurse woke the testator up and, he being unable to speak, interpreted for him that he wished to increase a legacy he had made in her favor from $1,000 to $8,000, and the testator assented and carefully read over a codicil, then and there made to that effect, before he signed it, and the attorney testified that he considered the testator of sound mind, the court considered that, in the absence of any other evidence of undue influence, the codicil should stand, as its terms were not unjust and no effort was shown to have been made to prevent the persons (the widow and children), who were alleged to have been discriminated against in and by the codicil, from having free access to the testator. Matter of Lacy, 581.

9. *Belief in Christian Science — Peculiar beliefs when not insane delusions — Presumption of undue influence subject to rebuttal — When a religious society may take under a will made within two months of death — R. L.* 1813, *ch.* 60; *L.* 1848, *ch.* 319, § 6.— A belief in Christian Science, when founded on religious convictions, is consistent with testamentary capacity and beyond the scope of judicial inquiry. The fact, that a sincere believer therein left her home and her sisters and lived apart from them because she believed that they persecuted her for her peculiar views — which they ridiculed and to which they were strongly opposed — does not necessarily show, even though she may have exaggerated their conduct, that she was subject to an insane delusion in the matter, nor can a will, subsequently made by her and by which she revoked a former will and gave the bulk of her estate to a Christian Science church, be set aside for that reason. A belief, in certain miraculous powers ascribed to Christian Science, not acted upon by her and her belief that that science had cured her of disease, cannot be deemed insane delusions, avoiding the will. The presumption of undue influence, which arises where a beneficiary of a will is a stranger and occupies a position confidential to the testatrix, is one of fact only and therefore may be overcome by evidence. A religious society, incorporated under the act of April 5, 1813 (R. L. 1813, ch. 60) and the acts amendatory and supplementary and not expressly or constructively made subject to L. 1848, ch. 319, § 6, declaring a devise or bequest to a corporation formed under the latter act invalid unless the will carrying it has been made and executed at least two months before the death of the testatrix, may take a bequest under a will so made, as said section 6 of the act of 1848 was not intended by the Legislature as a supplement to such laws as specially provide for the incorporation of religious societies. Matter of Brush, 689.

10. *Presumption of revocation, from cancellation of signature, when rebutted — Testator's declarations as to his testacy inadmissible — Admission of evidence subject to motion to strike out — 2 R. S., m. p.* 64, § 42.— In a proceeding to prove the will of a testator, it appeared that two days after his funeral three persons carefully searched every drawer of and every paper and

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WILL — Continued.
envelope in a roll-top desk, in the office of a corporation, which the testator in common with other employees of the corporation used at times and which at other times was left open and found therein no will, and that three hours later one of these persons, who was also an employee, by accident found in a drawer of the same desk the will in an envelope endorsed with the testator's initials, with its signature cancelled by vertical marks made by a hand which an expert testified was not that of the testator. The will was in favor of the persons and corporations whom he would have been likely to benefit by his will. Held, that the presumption of a revocation of the will, arising from the cancellation of the signature to it, was rebutted by the circumstances. That the cancellation must be deemed to have been made by a stranger, and that as there was no proof of authority to him from the testator nor proof of revocation by two witnesses, the cancellation was ineffectual to revoke the will. Where a will is contested upon the ground that the testator has revoked it in this manner, his declarations, subsequent to its execution, tending to show that he believed himself to be testate down to the day of his death, are inadmissible. In a Surrogate's Court, the admission of evidence, subject to a motion to strike it out and which subsequently is stricken out, is no more fatal to a defeated party than such a course would be upon an equity trial without a jury. Matter of Hopkins, 702.

See Dower; Partition; Trusts.

WITNESS.

Credibility.— Disparaging questions put to a defendant must either be relevant to the issue or tend to affect his credibility as a witness, and the extent of such an examination is within the discretion of the trial judge. Markgraf v. Klinge, 196.

See Evidence.

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